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LAW FIRM GENERAL COUNSEL:

THE NEED, THE ROLE, THE DUTIES

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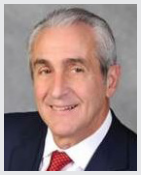
I. Introduction

Lawyers tend to be independent by nature. Several commentators have used the metaphor of "herding cats" to describe the independent mentality of most lawyers, and one writer commented that "law firms tend to be a collection of lone rangers." *See* Holly English, *The Value of Shared Values*, Texas Lawyer, Feb. 28, 2000 at S8; Susan Hackett, *In-House Counsel Must Take Initiative on Tackling Risk Management Issues*, 20 Lawyers Manual on Professional Conduct (ABA/BNA) 126 (March 10, 2004). In addition, many lawyers are resistant to the rationalization of law firm management because it constrains individual autonomy and creates a hierarchy among partners, which conflicts with the democratic premise of the partnership structure. Robert L. Nelson, *Partners With Power: The Social Transformation Of The Large Law Firm* (Berkeley: Univ. of California Press 1988), pp. 147–50 (discussing large law firms' tendency toward bureaucratic organization and management) and pp. 86–124 and 231–90 (discussing the tension between bureaucratic management and professional ideology). Despite these tendencies, anecdotal evidence tells us that law firms have accepted the general counsel position as a practical solution to the difficulties of managing everyday compliance with professional regulations, conflicts of interest, malpractice risks, duties of disclosure in litigation and transactions, and other professional concerns.

Once used only by the largest law firms in the country, the role of general counsel has become increasingly a necessary feature across all law firms, regardless of size. In 2004, the legal consulting firm of Altman Weil Inc. reported that major law firms were increasingly designating their own general counsel. *See* Ward Bower, *Major Law Firms Embrace General Counsel Concept*, Report to Legal Management, Vol. 31, No. 8 (May 2004), available at http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid//fa00e91f-9955-4dce-b6f4-d088b9fe2f0b/resource/Major_Law_Firms_Embrace_General_Counsel_Concept.cfm. Although some firms remain committed to the archaic model of decentralized "management by committee" in which an individual partner rotates management responsibilities while maintaining his or her own full-time practice, many law firms have recognized that it is increasingly necessary to dedicate one lawyer's time to matters such as conflicts, ethics, claims and loss prevention. In doing so, firms have departed from the inefficient practice of "general counsel by commit-



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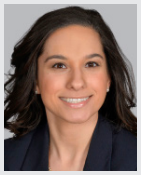

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tee" and have embraced the "established trend toward naming an in-house risk manager" to meet the contemporary demands of the practice of law. Gary Taylor, *Counsel to Law Firms Goes In-House*, Nat'l L.J., July 18, 1994 at A1.

This article defines the role of law firm general counsel through an emphasis on three distinct features of the position: the need, the role, and the duties. First, the *need* for a general counsel will be measured against the professional demands that push against today's law firms. Second, the role of general counsel will be defined by its critical functions within the law firm – the "lawyer for the lawyers." Finally, the multifaceted duties of general counsel will be explained within the context of the first two features, resulting in a workable application of the position.

The law firm general counsel has become the practical and convenient approach to a burgeoning problem — the pervasive supervision of the practice of law by multiple enforcement authorities.

II. The Need

The law firm general counsel has become the practical and convenient approach to a burgeoning problem — the pervasive supervision of the practice of law by multiple enforcement authorities. Rule 8.4 of the American Bar Association Model Rules of Professional Conduct (the "Rules of Professional Conduct"), entitled "Misconduct," provides:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socio-economic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Id. Professional misconduct that is criminal can be prosecuted by state authorities and, in some instances, by the federal government. Geoffrey C. Hazard, Jr., "*Lawyer for Lawyers": The Emerging Role of Law Firm Legal Counsel*, 53 U. Kan. L. Rev. 795, 798 (2005). For example, in *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), a lawyer who concealed a conflict of interest from a client was charged with mail fraud. The federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (2004), can be applied in similar fashion. *See, e.g.*, *United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986) (discussing lawyers convicted of RICO violation in connection with scheme to defraud insurance companies on injury claims).

Lawyers involved in transactional work, particularly those doing federal securities work, know that the Sarbanes-Oxley Act works in a similar way. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. The Securities and Exchange Commission ("SEC") has also implemented regulations that impose federal sanctions for corporate lawyers' violation of the ethical responsibilities set forth in Rule 1.13(b) of the Rules of Professional Conduct, which provides:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

Model Rules of Prof'l Conduct, R. 1.13(b); *see also* Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103

Colum. L. Rev. 1236 (June 2003) (discussing the ongoing interaction between the organized bar and the SEC).

Criminal exposure can arise from various forms of fraud in matters undertaken for clients, and the risk of civil liability has increased. There are now many lawyers who specialize in legal malpractice litigation on behalf of claimants. As summarized in the Restatement of the Law Governing Lawyers: "Upon admission to the bar of any jurisdiction, a person … is subject to applicable law governing such matters as professional discipline, procedure and evidence, civil remedies, and criminal sanctions." Rest. (Third) of the Law Governing Lawyers §1, *Regulation of Lawyers – In General* (2000).

"Complex" is an apt description for the regulated realm of a law practice, which requires consideration of professional regulations, conflicts of interest, malpractice risks, employment concerns, duties of disclosure in litigation and transactions, and other professional concerns.

Lawyers and law firms have always faced compliance-related concerns. For the most part, law firms have actively managed these concerns internally. Because the law firm is already managing compliance, it makes sense to manage the law firm's concerns through the most efficient means possible — general counsel. As former Chief Justice Rehnquist once observed, "corporations, unlike most individuals, 'constantly [needed to] go to lawyers to find out how to obey the law….'" *Upjohn Co. v. United States,* 449 U.S. 383, 392 (1981). Today's law firms find themselves in the same position, and a general counsel can fill that need. Appointing a designated individual who specializes in the "law of lawyering" makes resolving problems more efficient than reinventing the answers daily, weekly or monthly. Hazard, *supra*, at 795; *See also* Peter J. Winders, *Law Firm General Counsel – Extravagance or Necessity?*, 15 Journal of the Prof. Law. 1 (2005).

A. The Firm is Already Doing the Work of General Counsel

Today's law firms rely on the services and respective practice areas of their lawyers to meet many of their counsel needs. Firms use their lawyers out of necessity to resolve conflicts; to negotiate contracts; to handle employee issues; to handle insurance matters, particularly professional liability insurance matters; to assure compliance with ethics requirements; and to keep up with or resolve ethics issues. *Id.* at 1. However, in the words of another author, "[w]hen firm principals designate a general counsel they recognize that the complexities of organizational practice merit investing in a lawyer to focus on the firm's legal concerns." Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer*, 53 U. Kan. L. Rev. 835, 837 (2005), also available at http://scholarlycommons.law.hofstra.edu/faculty-scholarshp/136.

"Complex" is an apt description for the regulated realm of a law practice, which requires consideration of professional regulations, conflicts of interest, malpractice risks, employment concerns, duties of disclosure in litigation and transactions, and other professional concerns. Without designated general counsel – either an inside firm lawyer or outside counsel – the firm finds itself called upon to investigate the merits of complaints and claims against the firm on a case-by-case basis. The firm's employment lawyers might resolve employment concerns, while the firm's insurance lawyers review malpractice insurance policies. But legal malpractice insurers are beginning to require such functions to be formalized during the underwriting stage or as a condition to the policy. *See* Winders, *supra*, 1. As it turns out, many of these duties are already being carried out by the firm's members.

B. General Counsel by Committee is an Inefficient Model

We believe that one lawyer can meet the multifaceted legal needs of a law firm much more efficiently than a collection of committees with scattered responsibilities. While there are certain benefits to managing a law firm by committee, committees have a penchant for operating inefficiently. As one author noted, "Law firms are full of good ideas whose time is delayed in committee due to calendar conflicts." *Id.* at 4. Committee work spreads duties around and allows future managers to emerge, but it can also cause delay in the prompt handling of the firm's professional compliance.

Some authors have questioned whether law firms—especially large firms—can continue to get away with "taking turns" as a strategy for effective management. *See* Joel A. Rose, *Who Makes the Best Lawyer-Manager? Lawyer-Managers Must Balance Concerns of Firm and Attorneys*, The Legal Intelligencer, June 19, 2001 at 5 (arguing that "no longer is it feasible for partners to take turns serving on the management committee"). In an era of eat-what-you-kill compensation and intense pressure for client intake, busy partners may have little incentive to take on uncompensated management or general counsel responsibilities. Elizabeth Chambliss and David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 Arizona L. Rev. 559 (2002). As a result, large law firms tend to be under-managed. *See* S. S. Samuelson, *The Organizational Structure of Law Firms: Lessons From Management Theory*, 51 Ohio St. L.J. 645, 645 (1990) (stating that "[a]lthough firms generally recognize the need for more rational frameworks and have made considerable

efforts to improve management, serious organizational problems persist") (citations omitted).

Concerns such as loss prevention, ethics, conflicts, and claims are specialized subjects that need to be handled promptly, if not immediately. There should be measurable efficiency realized through the designation of general counsel whose job includes addressing how the firm's risks, taken together, might endanger the firm. Certain ethical concerns, particularly those related to conflicts of interest or ethical complaints within large law firms, require immediate attention that can only be obtained through a specifically-designated lawyer. Such pressing concerns can quickly consume the billable hours of several attorneys. The more efficient solution is to assign these concerns to one lawyer who specializes in the "law of lawyering."

A wealth of resources on the role of law firm general counsel are now available, and many commentators attribute the increasing reliance on the general counsel position to the increasing complexity of professional regulation along with the increasing number of claims against lawyers.

Compensation of the firm's general counsel can be one of the most delicate aspects of appointing a lawyer to the position. Nearly one-third of general counsel serve full time in that capacity, and part-time general counsel have proven even more difficult to compensate because of the balance that must be struck with the billable hour requirements typical of large firms. *See* Ward Bower, *New Survey Reports on General Counsel in Law Firms*, available at http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/f2047452-7994-4435-a3e5-1261853280e1/resource/New_Survey_Reports_on_General_Counsel_in_Law_Firms.cf (noting that part-time general counsel spend approximately thirty-six percent (36%) of their total hours in the role of general counsel, averaging 753 hours per year). While a full explanation of the many emerging compensation models for the general counsel position is beyond the scope of this article, many firms have been able to tailor compensation packages to accommodate decreased billable hours and otherwise meet firm needs.

C. Designation of a Law Firm General Counsel is the Solution

Many of the risks inherent in the practice of law are individual in nature, and the designation of a firm's general counsel can certainly help to raise the specter of such risks. In addition to individual risks, the risk of claims against the entire firm, such as employment law claims, is also growing more pronounced. According to a 2004 survey, general counsel from three hundred companies worry most about employment litigation and contract disputes. Brenda Sapino Jeffreys, *In-House Texas GCs Worry About Employment, Contract Disputes,* Texas Lawyer, Sept. 6, 2004 at 1. General counsel are usually better positioned to handle personnel claims and employment litigation than committees or hastily-retained outside counsel.

Law firms seem to be attractive targets for discrimination and harassment claims. *See* Philip M. Berkowitz, *Discrimination and Law Firms – Employment Law Issues,* 227 N.Y.L.J. 21 (March 14, 2002). And, implicit in the size of some jury awards against law firms is the idea that "lawyers and their firms should be held to a higher level of scrutiny because they should know the law." Danielle L. Hargrove and Cynthia L. Young, *We're Not Above the Law,* 56 Or. St. B. Bull. 23, 23–24 (1996). At the same time, various economic and sociological factors, including the deep pockets of firms and fading institutional loyalty, have been forecast as contributing factors to a rise in the number of employment claims. *Id.* at 23.

A firm's general counsel is also likely to be better suited to handling discrete tasks, such as addressing lawyer impairment and disability issues. In 2003, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion dealing with the ethical responsibilities of firm lawyers who know that a colleague is suffering from mental impairment. ABA Standing Comm. on Ethics & Professional Responsibility, Formal Op. 03-429 (June 11, 2003) (For commentary on this opinion, *see* Eileen Libby, *Sharing the Consequences: A Lawyer's Mental Impairment Raises Ethics Issues for Other Members of the Firm,* ABA J. Ethics, July 2003 at 32.) The opinion explains that firm partners, as well as any supervisors of an impaired lawyer, must take steps to insure the impaired lawyer's compliance with the Rules of Professional Conduct. *Id.* at 3. The opinion also addresses when firm lawyers have a duty to report ethics violations by the impaired lawyer. *Id.* at 5.

A wealth of resources on the role of law firm general counsel are now available, and many commentators attribute the increasing reliance on the general counsel position to the increasing complexity of professional regulation along with the increasing number of claims against lawyers. *See* Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 Geo. J. Legal Ethics 1011 (discussing the "growth in the number and size of awards for legal malpractice" and stating that legal ethics "has become a substantive area of law requiring specialized expertise"); Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 Notre Dame J. L. Ethics & Pub. Pol'y 103, 104 (2000) (stating that "in light of the increasing complexity of legal ethics issues, it makes no more sense to have everyone at the firm be an expert in legal ethics than it would to have everyone . . . be an expert in the details of ERISA").

In addition to managing claims and potential claims against the firm, in-house specialists may also play an important preventive role by increasing firm-wide awareness of ethics and regulatory issues. *See* Epstein, *supra,* at 1030–31 (discussing the ombudsman and risk management functions of in-house ethics advisors). The challenges facing contemporary firms can best be met by the law firm general counsel.

III. The Role

Most, if not all, attorneys practicing in large and midsize law firms would agree that "[r]egardless of how it is structured, the general counsel's role is an important one." Douglas R. Richmond, *Symposium: Why Do Lawyers Need a General Counsel? The Changing Structure of American Law Firms: Essential Principles for Law Firm General Counsel*, 53 U. Kan. L. Rev. 805, 807 (2005) (hereinafter referred to as *Essential Principles for Law Firm General Counsel*). The law firm general counsel provides a sense of security to his or her fellow attorneys by providing guidance on a myriad of issues ranging from malpractice concerns to firm employment decisions. When discussing the role of the general counsel, one author stated:

> Law firm general counsel tend to be personally committed to ethical practice, and to promoting ethical practice and regulatory compliance within their firms. They clearly assist their firms in resolving problems internally, before the lawyers involved or clients experience serious or lasting consequences. Law firm general counsel serve as an important resource for lawyers who "want to practice law the right way," but who are not currently familiar with ethics rules.

Douglas R. Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 Ky.L.J. 231, 267 (2007–2008) (hereinafter *Law Firm Partners as Their Brothers' Keepers*).

The effectiveness of a law firm's legal counsel depends on essentially the same factors that determine the effectiveness of legal counsel to any client: competence of counsel, seriousness of attention on the part of the client, and good communication.

The effectiveness of a law firm's legal counsel depends on essentially the same factors that determine the effectiveness of legal counsel to any client: competence of counsel, seriousness of attention on the part of the client, and good communication. *See generally*, Hazard, *supra,* at 795. Certain personal characteristics are necessary for a general counsel to be effective, including "strong interpersonal skills, as well as the appropriate background or training in legal ethics and professional responsibility." Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 Geo. J. Legal Ethics 95, 107 (2008). Once a law firm appoints an appropriately qualified lawyer as general counsel, he or she will take on a variety of roles and other lawyers in the firm will begin to rely on their new general counsel for ethical guidance and support. The general counsel is the chief legal officer of the firm and the principal legal counsel and adviser to management concerning matters of firm governance and policy.

A. Which Role for the General Counsel – Reactive or Proactive?

A law firm's general counsel normally embraces one of two roles: a reactive role (resolving problems) or a proactive role (avoiding problems). Fortney, *supra*, at 838–39. A reactive general counsel, which is the more prevalent role, typically focuses "on external challenges such as legal malpractice claims and government relations." *Id.* at 838. For example, a 2004 survey with fifty-six participating firms showed that most general counsel engage in reactive duties, such as advising the firm on professional liability matters and the engagement of outside counsel. *Id.* (citing Altman Weil, Inc., *Results of a Confidential "Flash" Survey on Law Firm General Counsel*, available at http://www.altmanweil.com/dir_docs/resource/d0f1e347-e90b-40ae-9b92-808a7eff6ffd_document.pdf (last visited April 8, 2015)). The tendency for the general counsel to serve in a reactive role is directly related to the increased risk of liability for law firms. *Id.* Even before a formal complaint or claim is filed against a law firm, a reactive general counsel can help steer the direction of the potential claim and increase the likelihood that the firm's internal communications regarding the potential claim may be protected from discovery by the attorney-client privilege or the attorney work product doctrine.

A proactive general counsel, on the other hand, ensures that concerns are identified and potential problems are entirely avoided before they arise. *Id.* at 839. A proactive general counsel has the ability to help a firm comply with applicable statutes, regulations, and ethical rules and may also help prevent employment claims against the firm by periodically reviewing the firm's employment policies and practices. *Id.* at 838, 848–49 n.66 (citations omitted). Additionally, a proactive general counsel often offers advice regarding the firm's structure, compensation system, and supervision and training of associates. *Id.* at 840–44. While the benefits of these proactive actions and duties are not always as immediate or readily apparent as the benefits of reactive actions and duties, proactive initiatives pay dividends in the long run. For instance, a general counsel that encourages the supervision and training of associates improves "quality and client satisfaction"

and helps the firm reduce its malpractice premiums and losses over time. *Id.* at 844.

While the majority of general counsel may identify themselves as either reactive or proactive, the ideal general counsel will be both. In order to properly advise a law firm, the general counsel must be able to implement an ethical infrastructure that prevents claims against the firm and be able to zealously advocate for the firm when claims do arise. *Id.* at 839, n. 26. Simply put, the "lawyers' lawyer" must be adept at both avoiding and solving problems.

... general counsel arrangement "heightens ethical awareness by fixing responsibility in one lawyer to whom other lawyers, ... may turn for a more objective evaluation of legal ethics issues."

B. How do Attorneys View Their General Counsel?

1. The Wise Ethicist

It is well recognized that "when the firm creates an in-house ethics counsel to whom partners and associates can easily confide about ethics issues, they promote the development of a culture of ethics." Ronald D. Rotunda, *Why Lawyers are Different and Why We are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior — In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 Akron L. Rev. 679, 704 (2011). Additionally, general counsel can be exceptionally helpful to associates who may lack the confidence to bring issues to the attention of other members:

> It should take little effort for the young associate to turn to his general counsel, who may be the lawyer down the hall or on the next floor, in order to seek candid advice. When a lawyer sees a problem or thinks she sees a problem but she is not sure and her colleagues do nothing, she can inform the general counsel about what she sees and know that she is speaking confidentially.

Id. at 705. Moreover, when a firm appoints a general counsel, members and associates often begin relying on the general counsel as their ethics expert, and this general counsel arrangement "heightens ethical awareness by fixing responsibility in one lawyer to whom other lawyers, ... may turn for a more objective evaluation of legal ethics issues." *Law Firm Partners as Their Brothers' Keepers*, *supra*, at 267.

While reliance on a general counsel for ethical advice is generally positive and benefits the firm as a whole, concern does exist that "the creation of ethics specialists in an increasingly complex and highly regulated ethics environment may pose some challenges to the continuing goal of individual ethics awareness and accountability." *Id.* at 268 (quoting Margaret Raymond, *The Professionalization of Ethics*, 33 Fordham Urb. L.J. 153, 155 (2005)). Moreover, scholars fear that associates and junior partners may view ethics as an area of expertise governed by the general counsel, which may result in these lower level lawyers ignoring the ethical rules in their practice. *Id.* Most practicing attorneys are not likely to be persuaded by these concerns because the concerns are detached from the realities of modern law practice. For example, one author noted that "[t]he long and short of it is that lawyers who want to practice ethically sometimes require related guidance. Whether they obtain that guidance from a law firm general counsel or a single document plainly expressing professional norms is irrelevant." *Law Firm Partners as Brothers' Keepers* at 269. Additionally, even when lawyers "do not initially consult the general counsel about an issue, they are likely to consult another lawyer whose judgment they trust, and between the two of them, they generally will reach an appropriate conclusion about involving the general counsel." *Id.* If the law firm is concerned that lawyers will "over-rely" on the general counsel, certain measures can be implemented to ensure that individual lawyers are aware of their ethical duties and any new development in the applicable ethics rules. These measures may include periodic in-house training sessions and/or mandatory ethics-based continuing legal education courses.

Of course, most firm lawyers remain cognizant of the ultimate responsibility for their conduct. Under the Rules of Professional Conduct, "'[a]dvice of counsel' is not a defense to professional discipline." *Id.* at 269–70. Additionally, Rule 5.1 charges partners, managers, and supervisory lawyers with certain responsibilities:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer

practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rules of Prof'l Conduct, R. 5.1, *Responsibilities of Partners, Managers, and Supervisory Lawyers*. Moreover, the Rules of Professional Conduct also hold associates and junior partners accountable for their actions:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

A law firm's general counsel must be well-apprised of the "conflict of interest" ethical rules and must be able to implement a firm-wide system that prevents violations of these rules.

Id. at R. 5.2, *Responsibilities of a Subordinate Lawyer*. Thus, even with the guidance of a general counsel, partners remain obligated to meet the ethical duties enumerated by the express provisions of Rule 5.1 and subordinate attorneys must remain in compliance with the Rules of Professional Conduct notwithstanding their reliance on advice from the law firm's general counsel. *See Law Firm Partners as Their Brothers' Keepers*, *supra*, at 269–70.

Lawyers' individual ethical responsibilities should not keep them from seeking the advice of general counsel. In fact, the Rules of Professional Conduct allow lawyers to seek out confidential ethical advice from other lawyers. Rotunda, *supra*, at 706. Rule 1.6(b)(4) specifically provides: "A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary ... (4) to secure legal advice about the lawyer's compliance with these rules;…" Model Rules of Prof'l Conduct, R. 1.6(b)(4), *Confidentiality of Information*. In summary, lawyers should utilize their general counsel when they are faced with ethical dilemmas because "[l]awyers are less likely to violate the ethics rules when they seek objective advice from other lawyers about their ethical duties…." Rotunda, *supra*, at 707.

2. *The Conflict Guru*

One of the vital functions encompassed in the role of general counsel is, without a doubt, "the oversight of client intake — and particularly the resolution of all conflicts of interest." *See* Davis, *supra*, at 108. Generally speaking, there are four types of conflicts:

(1) lawyers acting where a conflict arises between two or more existing clients (concurrent conflicts);

(2) lawyers acting where their own interests are involved (personal interest conflicts);

(3) lawyers acting against former clients (former client conflicts); and

(4) lawyers practicing in a firm acting when another member of the firm would be prevented in (1) to (3) above (imputation conflicts).

Id.; Janine Griffiths-Baker and Nancy J. Moore, *Colloquium: Globalization and the Legal Profession: Regulating Conflicts of Interest in Global Law Firms: Peace in our Time?*, 80 Fordham L. Rev. 2541, 2548 (May 2012). Rules 1.7 and 1.8 of the Rules of Professional Conduct address conflicts of interest between current clients and prohibit a lawyer from representing a client if the representation involves a concurrent conflict of interest. *See* Model Rules of Prof'l Conduct, R. 1.7 and 1.8. With regard to conflicts between former clients, Rule 1.9 of the Rules of Professional Conduct states, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Model Rules of Prof'l Conduct, R. 1.9(a). Finally, Rule 1.10 of the Rules of Professional Conduct provides the general rule for the imputation of conflicts of interest and essentially requires a lawyer to treat all of the firm's clients as his or her own clients for purposes of determining whether a conflict of interest exists: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless [one of the specifically enumerated exceptions applies]." Model Rules of Prof'l Conduct, R. 1.10(a).

A law firm's general counsel must be well-apprised of the "conflict of interest" ethical rules and must be able to implement a firm-wide system that prevents violations of these rules. The American Bar Association's standpoint is that a law firm must implement a conflict-checking sys-

tem in order to effectively analyze and successfully prevent conflicts of interest. Marian C. Rice, *Maintaining a Conflict-Checking System*, Law Practice Magazine, Vol. 39 No. 6, Nov./Dec. 2013, available at http://www.americanbar.org/publications/law_practice_magazine/2013/november-december/ethics.html. The general counsel of the law firm is in the perfect position to implement such a system (if the firm does not already have one in place) and verify that the system adequately protects the firm from ethics violations arising out of conflict of interest analysis.

Not only do general counsel serve to prevent ethical violations by offering advice regarding conflicts, but they also streamline the establishment of new business: "[g]eneral counsel also contribute to a firm's profitability, as in a new matter where the general counsel assists firm lawyers in obtaining conflict of interest waivers and appropriately documenting those waivers, allowing the firm to accept the matter and earn associated fees." *Essential Principles for Law Firm General Counsel, supra*, at 807. Overall, the general counsel's role in preventing conflicts of interest allows the firm to seamlessly bring in new clients while preventing violations of the rules of ethics.

Several federal courts have found that privileges are inapplicable when the plaintiff in the professional liability action was a client of the firm at the time of the alleged malpractice and the communications at issue were created while the plaintiff was a client.

3. The Privilege Protector

Another one of the most important duties encompassed in the role of general counsel is the management of professional liability matters. *Essential Principles for Law Firm General Counsel*, *supra*, at 820. During the investigation of professional liability claims, the general counsel often determines whether certain documents and information are protected by the attorney-client privilege and/or the work product doctrine and, if so, whether the firm can invoke these privileges to refuse to disclose the documents. *Id.*

Generally, courts have found that internal communications between lawyers in the firm, which are developed or revealed during the course of the investigation of a professional liability claim, are privileged and protected under either the attorney-client privilege or the work product doctrine. *Id. (*citing *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) and *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255 (S.D.N.Y. 1994)(attorney-client privilege attaches to communications with in-house counsel if the individual in question is acting as attorney)). However, the issue is not so clear cut when the internal communications at issue specifically deal with a former or current client who is suing the firm for professional malpractice. Several federal courts have found that privileges are inapplicable when the plaintiff in the professional liability action was a client of the firm at the time of the alleged malpractice and the communications at issue were created while the plaintiff was a client. *Essential Principles for Law Firm General Counsel*, *supra*, at 820-821. *See also Asset Funding Group, LLC v. Adams & Reese, LLP*, 2008 U.S. Dist. LEXIS 96505 (E.D. La. 2008)("A law firm's communication with in-house counsel is not protected by the attorney-client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communications."); *Thelen Reid & Priest, L.L.P. v. Marland*, 2007 U.S. Dist. LEXIS 17482 (N.D.Cal. 2007) (The Court recognized the confidentiality of consultations with the firm general counsel, but required disclosure of in-house communications made after the firm learned of the client's adverse claim. The Court also discussed circumstances triggering the firm's duties with regard to conflicts of interest); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, (E.D. Pa. 2002) (Documents regarding intra-firm communication about how to best position the firm in light of a possible malpractice action by a client was not protected from discovery by the attorney-client privilege and/or the work product doctrine.); *Bank Brussels Lambert v. Credit Lyonnais, S.A.*, 220 F. Supp. 2d 283, 288 (S.D.N.Y. 2002)(Law firm cannot invoke the attorney-client privilege against a current client when performing a conflict check in furtherance of representing that client.); *In re Sunrise Securities Litigation*, 130 F.R.D 560 (E.D. Pa. 1989).

On the other hand, some states' courts and at least one federal court have found that documents involving a client-plaintiff can be protected even if the document was prepared while the plaintiff was still a client. *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 109 (Ga. 2013) ("…once an attorney-client relationship has been established between firm in-house counsel and the firm for the purposes of defending against a perceived or actual legal action by the firm's outside client, the materials generated by in-house counsel in connection with those efforts should enjoy work product protection vis-à-vis the outside client just as in any other context.") *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1067-68 (Mass. 2013) (Court held confidential communications between law firm attorneys and a law firm's in-house counsel concerning a malpractice claim asserted by a current client of the firm are protected from disclosure to the client by the attorney-client privilege provided certain enumerate conditions were met. Finding that each of these criteria had been met, the Court affirmed the judge's order allowing the defendant

law firm and its attorneys to invoke the attorney-client privilege to preserve the confidentiality of the communications); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 538-539 (Ill. App. 2012) (finding the attorney-client privilege applied to communications concerning the client's malpractice claim even when the firm continued to represent the client); *TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio 2011) (The Court considered application of the attorney-client privilege to intra-firm loss prevention communications sought in legal malpractice case. Ultimately, the Court rejected the client's access to documents based, in large part, upon a failure to show "good cause" which would justify disregarding the otherwise applicable attorney-client privilege.); *see also* Daniel Hirotsu Woofter, *Current Developments 2013-2014: The "Attorney-Law Firm" Privilege: Protecting Intra-Firm Communications Regarding a Current Client's Potential Malpractice Claim*, 27 Geo. J. Legal Ethics 987 (2014).

Jurisdictions that have deemed communications involving client-plaintiffs to be protected have enumerated certain requirements that must be met before a privilege can attach.

As indicated by the cases highlighted above, there is currently a spilt among federal and state jurisdictions regarding this issue. Jurisdictions that have deemed communications involving client-plaintiffs to be protected have enumerated certain requirements that must be met before a privilege can attach. For example, the Supreme Judicial Court of Massachusetts determined that communications between lawyers and the law firm's general counsel regarding a malpractice claim asserted by a current client are protected by the attorney-client privilege if the following requirements are met:

> (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel, (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential.

RFF Family P'ship, LP, 991 N.E.2d at 1068. The Supreme Court of Georgia held that the analysis of whether the attorney-client privilege applies to protect intra-firm communications with the firm's general counsel is not different from the privilege analysis in any other lawsuit. Following this rationale, the Court stated:

> …the attorney-client privilege, which provides that the privilege attaches to communications between a law firm's attorneys and its in-house counsel regarding a client's potential claims against the firm, applies where (1) there is a genuine attorney-client relationship between the firm's lawyers and in-house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence, and (4) no exception to the privilege applies.
>
> *St. Simons Waterfront, LLC*, *supra*, 746 S.E.2d at 108 (citations omitted).

Although the privilege determination is wholly dependent upon jurisdiction, the foregoing serves as an illustrative framework to maintenance of privilege. With a nod to this framework, a law firm can take steps to ensure that internal communications with general counsel remain protected.

IV. The Duties

The duties of a law firm's general counsel are intrinsically woven into the role of general counsel and can be tailored to fit the needs of any particular firm. Nonetheless, the role of general counsel can be distilled into certain fundamental duties that are universally recognized as essential to the position. The duties of the law firm general counsel can be separated into "essential" duties and additional "ethical" duties. *Essential Principles for Law Firm General Counsel*, *supra*, at 816–817; *see also Law Firm Partners as Their Brothers' Keepers*, *supra*, at 268.

The following list of "essential" duties is not intended to be exhaustive or all-inclusive, but can serve as a starting point for a general counsel's job description. The general counsel should:

a. counsel the firm's management with respect to the legal implications of the firm's major decisions, strategies, and transactions;
b. coordinate the firm's loss prevention efforts;
c. serve as the chief legal officer of the firm and advise the firm's management on issues of firm governance, risk management, firm growth, policy implementation, internal and external communications relating to sensitive matters, strategic planning and execution, and special projects;
d. investigate allegations of malpractice or misconduct by firm lawyers;
e. negotiate or review and approve all contracts and agreements between the firm and its partners, employees, or any third parties;

f. handle the various legal issues that firms face;

g. advise firm management and other lawyers on various legal issues;

h. ensure compliance with applicable laws and regulations relating to employment relationships, employee benefit programs, intellectual property rights and obligations, and professional responsibilities;

i. educate and consult with other lawyers in the firm on professional responsibility issues;

j. vet lateral attorney candidates, especially lateral partner candidates;

k. consult with lawyers on conflict of interest and business acceptance issues; and

l. engage and supervise outside counsel when necessary.

See Essential Principles for Law Firm General Counsel, *supra*, at 815 (citations omitted). In addition, a general counsel may take on the following additional duties in order to provide "ethical" advice to the law firm:

a. coordinate or prepare responses to disciplinary complaints and disqualification motions directed against the firm and its lawyers;

b. review law firm marketing materials to ensure their compliance with ethics rules related to advertising and solicitation;

c. develop standardized policies and forms; and

d. assist with billing and trust account matters.

Id. at 816 (citation omitted). Finally, general counsel is uniquely situated to influence the firm's implementation of robust policies and procedures related to the practice of law. Depending on the firm, any of the following policies might be appropriate:

a. Retention Of Consultants And Experts;

b. Reporting Claims and Potential Claims;

c. Calendaring Procedures for Trust Accounting;

d. Procedures For When An Attorney Leaves The Firm;

e. Document Retention and E-Mail;

f. Conflicts Of Interest;

g. New Business Intake Procedures;

h. Use Of Firm Name;

i. Subpoenas;

j. Opinion Policy;

k. Sarbanes-Oxley Compliance Policy;

l. Internet Postings Policy;

m. Social Media Policy;

n. Anti-Bribery and Anti-Corruption Policy;

o. Anti-Money Laundering Policy; and

p. Referring and Accepting Referrals Of Matters.

V. Conclusion

The number of firms designating general counsel will likely continue to trend upward as firms realize the practical significance of the role. The general counsel position is undeniably well suited to managing the everyday compliance of a contemporary law firm with professional regulations, conflicts of interest, malpractice risks, duties of disclosure in litigation and transactions, and other professional concerns related to the practice of law.