WHO LET YOU INTO THE HOUSE?

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Recent Congressional corporate governance initiatives have reallocated to independent directors the functions of hiring and supervising the work of certain "gatekeepers," and some have proposed such a reallocation with respect to general counsel as a means to address cognitive biases and capture by senior management that may prevent inside counsel from identifying and preventing corporate misconduct. That proposal, however, does not sufficiently account for the positive effect on corporate conduct arising from a close relationship of trust and confidence between general counsel and the CEO or other senior managers. Eliminating such a relationship is likely to undermine access to internal information and the willingness of corporate actors to respond positively to counsel's efforts to promote legal compliance. In contrast, steps short of reallocating oversight of the general counsel to independent directors are likely to promote independent judgment on the part of general counsel without unduly undermining those benefits.

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INTRODUCTION

The title of this Symposium—"Who's in the House?"—poses the increasingly important question of the identity and characteristics of the employees of public corporations, especially their general counsel, who function as lawyers for the corporation. The title of this Essay poses the narrower, threshold question (pun intended) of how the general counsel of the public corporation enters "the house," and what that mode of entry says about the role and function of general counsel.

In response to that question, it has been suggested that the general counsel could more effectively prevent corporate misconduct and promote corporate compliance if her or his independence from the chief executive officer and other senior managers were enhanced. In particular, this Essay examines the suggestion that the general counsel enter the corporate "house" at the instance and under the control of a committee of independent directors, and not at the instance or subject to the control of the corporation's chief executive officer.[1]

This suggestion echoes recent actions by Congress, in its occasional, crisis-driven forays into the field of public company governance, in which it has manifested a decided preference for the use of independent directors as a positive force.[2] Congress has conferred important governance responsibility on independent directors in matters—notably auditing financial statements and evaluating executive compensation—as to which there has been concern that objective monitoring and evaluation by professionals retained by the corporation are compromised by too close an association with senior management.[3]

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1. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1053–55 (2005).

2. Part II below focuses on Congressional directives placing control of outside auditors and compensation consultants in the hands of a committee of independent directors. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), included several other initiatives requiring the appointment of independent directors for bank holding committee risk committees, § 165(h)(3)(B), 124 Stat. at 1430, and nationally recognized statistical rating agencies, § 932(t)(2), 124 Stat. at 1882.

3. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775–76 (codified at 15 U.S.C. § 78j-1(m)(2) (2006)) (requiring, through implementing listing standards, the audit committee of exchange-traded company boards of directors to "be directly responsible for the appointment . . . and oversight of the work of any registered public accounting firm employed by that issuer . . . and each such registered public accounting firm shall report directly to the audit committee"); Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 952, § 10C(c)(B) (to be codified at 15 U.S.C. § 78j-3) ("The compensation committee of an issuer shall be directly

In varying degrees, some have suggested that the hiring, firing, supervising, and compensating of the corporation's chief legal officer, whose loyalty is owed to the abstraction of the organization rather than to any of its constituents (notably senior management), should similarly be controlled by a committee of independent directors. One can readily foresee, in fact, that mandating such control could easily find its way into the Congressional agenda in response to the next crisis in which it is perceived that governance failures have led to corporate malfeasance, and when some leading figure asks rhetorically, "Where were the lawyers?"[4]

This Essay warns against reflexive acceptance of the suggested control of the general counsel by independent directors, for several reasons. First, general counsel simply do not occupy the same role as outside auditors or compensation consultants: for better and worse, their relationship to the chief executive officer is commonly one of close proximity and trust. Second, there are important benefits to the corporation that arise from general counsel's close relationship with senior management, and that would likely be eliminated by a wholesale shift of responsibility for hiring, firing, supervising, and compensating the general counsel. Third, any such response to concern over general counsel's capture by senior management fails to acknowledge the potential that more nuanced steps may be less likely to eliminate those benefits, yet at the same time mitigate bias-related drawbacks associated with close general counsel/CEO relationships.

No one disputes that a general counsel's professional obligations are owed to the entity, and that the general counsel must maintain and bring to bear independent professional judgment in counseling the corporation. Likewise, no one can seriously dispute that general

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responsible for the appointment, compensation, and oversight of the work of a compensation consultant.").

4. This inquiry into counsel's whereabouts has been attributed to Judge Stanley Sporkin's opinion in *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990). *See, e.g.*, Ed Hendricks & Mary Berkheiser, *Where Were the Lawyers?*, 18 LITIG. 30 (1992) (title of work is a popular mantra in response to many instances of questionable corporate conduct in which it is suspected that counsel either promoted or improperly failed to prevent such conduct); Sarah Kellogg, *Financial Crisis 2008: Where Were the Lawyers?*, WASH. LAW., Jan. 2010, at 20, 23, *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/financial_crisis.cfm; Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993); Ashby Jones, *Where Were the Lawyers?*, WALL ST. J. L. BLOG (Jan. 2, 2007, 8:52 AM), http://blogs.wsj.com/law/2007/01/02/where-were-the-lawyers/; Richard Moorhead, *Hackgate: Where Were the Lawyers?*, LAW. WATCH (July 10, 2011), http://lawyerwatch.wordpress.com/2011/07/10/hackgate-where-were-the-lawyers/.

counsel's independent judgment can be compromised by working in close proximity to the CEO and other senior managers. There are many steps, however, short of turning over to independent directors the exclusive responsibility for hiring and supervising the general counsel, that may promote the desired level of independent judgment and counseling by general counsel. Such possible measures include:

(1) Explicitly and continually identifying general counsel's independence as a norm and expectation by consensus of both independent directors and senior managers;

(2) Involving independent directors in interviewing and evaluating general counsel candidates;

(3) Encouraging the CEO to consult with independent directors in selecting the general counsel;

(4) Encouraging the CEO to consult with independent directors in designing and revising the general counsel's compensation package;

(5) Encouraging the CEO to establish a relationship with the general counsel in which the general counsel has direct access to the CEO, and in which the general counsel is expected to engage in an advisory function rather than simply manage delegation of responsibility for providing legal services to the corporation;

(6) Providing regular opportunities for the independent directors to consult with the general counsel in an "executive session," outside the presence of the CEO and other senior managers; and

(7) Otherwise encouraging independent directors to consult with the general counsel, without the intervention of other senior managers.

Part II of this Essay briefly examines the ways in which recent Congressional initiatives in the area of corporate governance have relied upon shifting to independent directors the responsibility for hiring and supervising the work of certain providers whose services to the corporation may counteract inappropriate conduct by management. Part III describes the proposal to apply that sort of approach to the hiring and supervision of general counsel. Part IV presents a critique of that proposal, and the conclusion examines the range of potentially less-drastic means to reinforce general counsel's independence without foregoing the benefits of a close relationship between general counsel and senior management.

I. LEGISLATIVE INITIATIVES RE-SITUATING OTHER GOVERNANCE INPUTS

The story of the collapse of Enron and WorldCom, and the response of Congress to those scandals via the adoption of the

Sarbanes-Oxley Act of 2002, need no lengthy retelling here.[5] The background and roots of the more recent economic crisis that led to the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") likewise are increasingly well documented.[6] Most notable for present purposes, however, is the fact that both Congressional responses included legislation targeted at perceived weaknesses in corporate governance: in particular, perceived weaknesses in the ability of corporate service providers to provide advice and judgment sufficiently independent of senior management to rein in perceived abuses by management.

In regard to Sarbanes-Oxley, the relevant story goes something like this. As a result of accounting scandals and financial mismanagement, most famously at Enron and WorldCom, it came to be widely perceived that outside auditing firms had become insufficiently independent of senior management to permit them to exercise independent judgment and act effectively as gatekeepers to curb financial fraud. Congress responded with a variety of measures, including establishing an entirely new regulatory body (the Public Company Accounting Oversight Board, or PCAOB) to govern public company auditing firms, prohibiting such firms from providing a variety of non-audit services to their audit clients, and requiring that board audit committees be composed exclusively of independent directors. Most notably for present purposes, however, Congress also included what was, in essence, a requirement—section 301 of the Act[7]—that public company auditing firms should no longer be chosen, compensated, and supervised (and fired) by senior management; rather, responsibility for those functions would be expressly conferred upon the audit committee, as newly constituted. As the SEC explained in adopting rules implementing section 301, "[h]istorically, management has retained the accounting firm, negotiated the audit fee, and contracted with the accounting firm for other services," but "[a]n audit

5. *See generally* NANCY B. RAPOPORT ET AL., ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (2d ed. 2009); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002).

6. *E.g.*, FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf; DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (*UNINTENDED*) CONSEQUENCES (2011); Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 HARV. BUS. L. REV. 1 (2011); Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II* (UCLA Sch. of Law, Law-Econ Research Paper No. 10-12, 2010), *available at* http://ssrn.com/abstract=1673575.

7. Sarbanes-Oxley Act § 301 (codified at 15 U.S.C. § 78j-1(m)(2006)).

committee . . . may enhance auditor independence from management by appointing, compensating and overseeing the work of the independent accountants."[8]

The parallel story in the Dodd-Frank Act follows a similar path, but addresses outside consultants retained to advise on executive compensation issues. Although not all commentators on the subject agreed that compensation of executives in public companies had become unduly inflated due to lack of effective checks on managerial control of compensation decisions,[9] many observers believed that senior executives had largely captured and dominated the process of determining their compensation.[10] In particular, many believed that outside consultants engaged to advise on the fairness or appropriateness of executive compensation proposals were insufficiently independent of the senior managers as to whose compensation they were being consulted.[11] The proposed remedy, which came to fruition in section 952 of the Dodd-Frank Act, was the provision requiring that compensation committees (to consist exclusively of independent directors) "be directly responsible for the appointment, compensation, and oversight of the work of a compensation consultant."[12]

There is a superficial logic in extending these two Congressional initiatives to any category of persons whose services to the corporation

8. Strengthening the Commission's Requirements Regarding Auditor Independence, 68 Fed. Reg. 6006, 6022 (Feb. 5, 2003) (to be codified at 17 C.F.R. pts. 210, 240, 249, and 274).

9. *E.g.*, Steven N. Kaplan & Joshua Rauh, *Wall Street and Main Street: What Contributes to the Rise in the Highest Incomes?*, 23 REV. FIN. STUD. 1004, 1007, 1047 (2010) (suggesting that "skill-biased technological change" and "greater scale" best account for increases in executive pay, and "that powerful CEOs or poor corporate governance cannot possibly be more than a small part of the picture of increasing income inequality, even at the very upper end of the distribution").

10. *E.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004); *see also* Randall S. Thomas & Harwell Wells, *Executive Compensation in the Courts: Board Capture, Optimal Contracting, and Officers' Fiduciary Duties*, 95 MINN. L. REV. 846 (2011) (reviewing the opposing views of optimal contracting theory and board capture theory in evaluating executive compensation and advocating heightened judicial scrutiny of officer compensation decisions under fiduciary duty principles).

11. *See, e.g.*, MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, EXECUTIVE PAY: CONFLICTS OF INTEREST AMONG COMPENSATION CONSULTANTS (2007), *available at* http://www.erieri.com/PDF/Executive-Consultant-Conflicts.pdf. *But cf.* Martin J. Conyon, *Compensation Consultants and Executive Pay* (Cornell Univ. ILR Sch., Compensation Research Initiative, CRI 2009–10, 2009), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=cri.

12. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 952, § 10C(c)(1)(B), 124 Stat. 1376, 1902 (2010) (to be codified at 15 U.S.C. § 78j-3).

are intended to function in any significant way as a check on managerial misconduct. It is at least plausible to maintain that the general counsel of a publicly traded corporation serves that function, at least in part.[13] If the general counsel is to function in part as a "cop" promoting corporate legal compliance[14]—including compliance on the part of senior management—it is quite foreseeable that, following the next financial crisis that moves Congress to examine corporate governance, attention will again turn to regulation of the lawyer-client relationship between the general counsel and the public company.[15] Indeed, proposals for precisely such regulation have already been made, as explained more fully now.

II. PROPOSALS TO RE-SITUATE GENERAL COUNSEL UNDER THE CONTROL OF INDEPENDENT DIRECTORS

It is widely understood and accepted, at least nominally, that the lawyer employed by a public corporation, or any organizational client for that matter, owes professional duties of loyalty and competence to the organization.[16] Conversely, the lawyer employed by the organization may not allow the views or conduct of the organization's constituents—notably its senior officers, in the case of the corporation—to impair the lawyer's obligations to the organization. It is also widely understood and accepted, however, that the circumstances of general

13. *E.g.*, Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 463 (2000) (role of in-house lawyers includes "policing the conduct of their business clients").

14. *Id.* at 463; *see also* William H. Dorton, *Corporate Gatekeepers: An Examination of the Transactional Lawyer's Role*, 99 KY. L.J. 555, 562 (2010–11) (describing the corporate transactional lawyer as "a 'cultural shepherd' whose role is to steer the company toward compliance with positive regulations, even for matters only implicitly governed by those regulations").

15. The Sarbanes-Oxley Act, of course, set a precedent for regulation of the lawyer-client relationship, at least in relation to services constituting "practicing before the [Securities and Exchange] Commission." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784.

16. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2011) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 96 cmt. b (2007) ("A lawyer who has been employed or retained to represent an organization as a client owes professional duties of loyalty and competence to the organization. By representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals employed by it or who direct its operations . . . . [P]ersonal dealings with such persons do not lessen the lawyer's responsibilities to the organization as client, and *the lawyer may not let such dealings hinder the lawyer in the performance of those responsibilities.*" (emphasis added)).

counsel's employment—including the role of the chief executive officer and other senior officers in hiring general counsel and establishing compensation of general counsel, and daily exposure to and adoption of the perspective of senior management—call into question general counsel's ability to serve the interests of the organizational client where senior managers engage in activities that are inimical to those interests.[17]

To varying degrees, commentators have lamented general counsel's perceived lack of ability to promote the best interests of the organization, due to lack of independence from senior management.[18] Not surprisingly, and as a remedy designed to enhance that independence, those commentators suggest that to function better as a "gatekeeper,"[19] general counsel should be hired, compensated and supervised by someone other than senior management, and the CEO in particular. In line with the approach observed in the previous Section in relation to outside auditors and compensation consultants, it has been suggested that independent directors are particularly well suited to take on this supervisory role in relation to general counsel, and to enable general counsel to function effectively as corporate gatekeepers.

The leading, and very articulate, proponent of this approach—"re-situating the inside counsel as gatekeeper" under the supervision and control of independent directors—is Professor Sung Hui Kim. In the

17. *E.g.*, Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 956 (2005); E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 14 (2006) (citing Z. Jill Barclift, *Corporate Responsibility: Ensuring Independent Judgment of the General Counsel—A Look at Stock Options*, 81 N.D. L. REV. 1, 3, 24 (2005); DeMott, *supra*, at 968).

18. *E.g.*, Stephen M. Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. ST. THOMAS L.J. 909, 920 n.73 (2004) (quoting Hon. Stanley Sporkin, U.S. Dist. Court for D.C. (Retired), Keynote Address at the American University Law Review Symposium: The Evolving Legal and Ethical Role of the Corporate Attorney after the Sarbanes-Oxley Act of 2002 (Nov. 22, 2002), *in* 52 AM. U. L. REV. 639, 651 (2003) ("There are a lot of overbearing CEOs that think that because they hire the general counsel the general counsel better be beholden to that person.")). "[I]n-house lawyers have strong incentives to stay on the good side of senior management," and general counsel's "tenure normally depends . . . on his relationship with the CEO." *Id.* at 920. "[B]ehavioral economic analysis suggests certain basic cognitive biases likely to discourage lawyers from detecting or acting upon management misconduct." *Id.* at 921.

19. The term "gatekeeper" ought to be used guardedly. *See* Veasey & Di Guglielmo, *supra* note 17, at 29 ("[O]ur concern is that the term 'gatekeeper' may, in certain situations, be either too broad or too narrow, and thus may be misleading as an appropriate model for understanding counsel's role."). For purposes of this Essay, that term should be understood, broadly and imprecisely, to include any person—including an inside lawyer, particularly general counsel—who is in a position to detect and deter corporate misconduct.

first of a series of papers that ought to be required reading for any student of the role and professional responsibilities of in-house counsel, she carefully and cogently identifies the various psychological pressures on inside counsel to conform their views and behavior (and, of course, their legal guidance, or lack of it) to the views expressed by the CEO and other senior managers, rather than independently advocating for the interests of the corporation as a whole.[20] At first blush, paradoxically however, a subsequent article, with equal care and persuasiveness, explains why in-house counsel is nevertheless likely to be considerably better suited to act as a gatekeeper than outside counsel.[21] Consistent with this view of inside counsel as superior gatekeepers, Kim proposes to enhance inside counsel's ability to act as a gatekeeper by, as she puts it, "transform[ing] the ethical ecology of inside counsel."[22] To accomplish this transformation, Kim proposes, most importantly, that a committee of independent directors "make hiring and firing decisions, evaluations, and compensation determinations for the general counsel and . . . determine the budget for her department."[23]

Kim acknowledges that her proposal to re-situate inside counsel "sharply alters" the structure of the relationship between the general counsel and the corporation.[24] In fact, her proposal is nothing short of radical, at least as measured by its distance from tradition and current practice. Descriptions of the process for hiring general counsel overwhelmingly report that the CEO dominates the process and probably has determinative authority on the hiring decision.[25] Even

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20. Kim, *supra* note 1, at 1001–34 (reviewing "obedience pressures," "threatened self-interest," "alignment pressures," "role ideology," "conformity pressures," "organizational silence," "self-serving bias," and "motivated reasoning" as factors tending to reduce the effectiveness of inside counsel in evaluating and limiting corporate misconduct).

21. Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413–14 (2008). In this article, Kim presents a two-by-two matrix of factors for evaluating the effectiveness of a gatekeeper: "willingness to interdict" misconduct, "willingness to monitor" for misconduct, "capacity to interdict," and "capacity to monitor." *Id.* at 421.

22. Kim, *supra* note 1, at 1053.

23. *Id.* at 1055.

24. *Id.* at 1056.

25. E. NORMAN VEASEY & CHRISTINE T. DIGUGLIELMO, INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY 54 (2012) ("The normal hiring and firing mode in U.S. corporations is for the CEO to do the screening (or have it done), to interview candidates, and to select the person he thinks should become the general counsel."); DeMott, *supra* note 17, at 967 ("[I]n a large corporation . . . the CEO has a substantial if not exclusive role in choosing the general counsel."); Catherine Nathan et al., *Eight Best Practices for Conducting a Successful General Counsel Search*, SPENCERSTUART (Jan. 2009), http://content.spencerstuart.com/sswebsite/pdf/lib/

those who advocate greater input from the board of directors on that hiring decision at least implicitly acknowledge the CEO's ultimate control of the decision.[26] According to a 2008 survey of public

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lglIC_0109.pdf ("In conducting a general counsel search, the goal is to recruit a general counsel who will ultimately be a trusted advisor and true confidant, a consigliere, to the CEO. Since the CEO is the ultimate decision maker in the general counsel search, the process goes faster when the human resources executives encourage and facilitate CEO involvement in initial meetings and regular progress calls instead of only including the CEO in the kickoff meeting or the final candidate interviews."); *General Counsel*, ESQ RECRUITING, http://www.esqrecruiting.com/general-counsel.php (last visited Jan. 17, 2012) ("Since the general counsel will ultimately become a trusted advisor to the CEO, and the CEO is most often the ultimate decision-maker in hiring the general counsel, we prefer to involve senior management in the process early to encourage discussions and build consensus about the requirements and preferences sought for the position."); *Hiring a General Counsel*, INHOUSE INSIDER (July 23, 2009), http://www.inhouseinsider.com/
hiring-a-general-counsel/ ("In conducting a general counsel search, your organization needs to be ready to invest financially, as well as in terms of time and effort. Since the general counsel will act as the trusted advisor to the CEO, the process will be more successful if those conducting the search involve the CEO early and often. Rather than only including the CEO in the initial meeting or on the review of the final candidate(s), the CEO should be regularly included in each step of the process.").

26. Michael W. Peregrine, *Having the General Counsel's Back*, TRUSTEE, Oct. 2009, at 30, 31, *available at* http://www.mwe.com/info/pubs/Trustee_1009.pdf ("The board should have information or (better) ratification rights with respect to the hiring, compensation and termination of the general counsel."); Ben W. Heineman, Jr., Acceptance Speech for the Lifetime Achievement Award at the 2008 Corporate Board Member Magazine Legal Recognition Dinner (June 19, 2008), *available at* http://www.boardmember.com/legaldinnerlifetimeachievement.aspx ("[I]inside lawyers have got to figure out [how] you can both be a friend and partner with the CEO and have the courage and the guts and the credibility to stand up and say not this time, not this way. And I think that one of the ways to do that is to recognize explicitly that there is this tension, to *have the CEO recognize it when they hire general counsels*, to have the board recognize it when it talks to the CEO about hiring general counsel . . . ." (emphasis added)); Catherine Nathan, *The Board of Directors and the New Reality in the Recruitment of General Counsel*, SPENCERSTUART (May 2006), http://content.spencerstuart.com/sswebsite/pdf/lib/LegalBluePaper_5_06.pdf ("If directors' preferences are understood at the outset, the CEO can work during the early stages of the search to manage their preconceptions."); *The Changing Role of General Counsel: From Reactive to Proactive; from Passive to Being the Company's Conscience*, METROPOLITAN CORP. COUNS. (Aug. 1, 2007), http://www.metrocorpcounsel.com/
current.php?artType=view&artMonth=August&artYear=2007&EntryNo=7007 (

"The board should be involved in hiring general counsel and in approving general counsel's compensation. Most boards have the responsibility to appoint the company's senior executives, but given the pivotal role that general counsel plays today, it is essential that the board be satisfied with the *CEO's selection of general counsel*. Board members will have frequent occasion to communicate with general counsel in both board and committee meetings. They need to have trust and confidence that the individual occupying this position will be an independent and reliable source of information and advice. For this reason, they should have an opportunity to weigh in on the *CEO's choice as general counsel*, and indeed, many CEOs will actively seek their company directors and general counsel, "[m]ost directors and general counsel . . . say the board should interview the candidate, but the CEO should make the final decision."[27]

As radical as Kim's prime restructuring proposal may be, it is not without some connection to earlier recommendations. In the 2003 report of the ABA's Presidential Task Force on Corporate Responsibility,[28] which Kim argues suffered from "a profound misunderstanding of the ethical ecology of inside and outside lawyers,"[29] there is a recommendation that "public corporations should adopt practices in which . . . [t]he selection, retention, and compensation of the corporation's general counsel are approved by the board of directors," which body is elsewhere recommended to be composed of a substantial majority of independent directors.[30] While that task force report did not urge that independent board approval of hiring general counsel should exclude and replace a role for the CEO in hiring general counsel, it certainly said nothing to argue in favor of the CEO's traditional and primary decisional authority with respect to that hiring choice. In 2004, former Delaware Supreme Court Chief Justice E. Norman Veasey similarly urged that "the board must have a voice in

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input in selecting a new general counsel. Director input would seem equally important in evaluating the general counsel's performance and compensation. With respect to termination, the board needs to be fully cognizant of the circumstances surrounding the dismissal of general counsel, even if *the actual decision is that of the CEO.*" (emphasis added)); *Success as General Counsel Requires Proactive Engagement: The Editor Interviews Michael R. McAlevey, Vice President and Chief Corporate Counsel, Vice President, Chief Corporate, Securities, and Finance Counsel, General Electric*, BAIDU.COM (Dec. 21, 2007, 9:37 PM), http://hi.baidu.com/shanghailawyer/blog/item/02497fd877f3b53132fa1c71.html [hereinafter *McAlevey*] ("Editor: Should the board be involved in the compensation and retention of the general counsel? McAlevey: Independence is key to the general counsel's effectiveness. He has to be viewed as independent by the board and senior management. . . . However, this does not require the board to have an approval right over compensation decisions for the general counsel. The board operates most effectively serving in an oversight and advisory role. The board should be advised of how the general counsel is selected and how the general counsel is compensated and then provide advice and consent. I cannot imagine a CEO hiring a general counsel without having thoroughly vetted that person with the board.").

27. CORP. BOARD MEMBER, WEIGHING IN ON THE ISSUES: GENERAL COUNSEL AND DIRECTORS EXPRESS PRIORITIES AND CHALLENGES FOR THE YEAR AHEAD IN THE *CORPORATE BOARD MEMBER* 3 (2008), *available at* http://www.fticonsulting.com/global/resources/documents/weighing-in-on-the-issues-report.pdf (indicating that fifty-six percent of directors and sixty-five percent of general counsel believe that the final decision to hire the general counsel should be made by the CEO).

28. *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145 (2003) [hereinafter *ABA Task Force Report*]. The author served as a reporter for that task force. *Id.* at 145.

29. Kim, *supra* note 1, at 1040.

30. *ABA Task Force Report*, *supra* note 28, at 161.

the selection and retention of the general counsel"[31]—although, again, he did not directly address whether the CEO should continue to have primary or even shared hiring authority. And while perhaps more a matter of form than substance, Professor Deborah DeMott also cites a "sample" bylaw provision to the effect that the "general counsel . . . shall be appointed by resolution of the board of directors."[32] Likewise, commentators subsequently echoed the suggestion of board approval of general counsel hiring, without mentioning (or, on the other hand, explicitly rejecting) a role for the CEO.[33]

The asserted benefits of re-situating authority over the hiring and supervision of general counsel are several. First, Kim suggests that answering to a higher authority (a board committee) would enable general counsel to "be more comfortable in exercising their gatekeeping functions."[34] Second, she argues that it would "reduce the automatic tendency to conflate the corporate client with the senior officers whom insider lawyers have traditionally served."[35] Third, requiring general counsel to report to a board committee rather than the CEO would "mitigate[] the 'team player' pressures that can lead to organizational silence."[36] Finally, Kim suggests that such reporting would encourage reporting of internal misconduct to the board "[b]y getting rid of the middleman (for example, the CEO)" and making reporting to the board

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31. E. Norman Veasey, *Separate and Continuing Counsel for Independent Directors: An Idea Whose Time Has Not Come as a General Practice*, 59 BUS. LAW. 1413, 1414 (2004).

32. DeMott, *supra* note 17, at 967 & n.63 (citing CAROLE BASRI & IRVING KAGAN, CORPORATE LEGAL DEPARTMENTS § 2:2 (3d ed. 2004)). According to DeMott, "[t]he bare bones of general counsel's position as a corporate officer normally would be defined in the corporation's bylaws." *Id.* at 967. This assertion is questionable: although it would certainly be difficult to prove that bylaws never define the role of general counsel, it seems much more likely, based on review of public company bylaws, that they rarely if ever even mention general counsel, let alone define general counsel's role. DeMott also asserts that a "general counsel would, as a corporate officer, be appointed to office by the board of directors." *Id.* Again, that assertion is questionable: more commonly, one would expect that a general counsel would or could be appointed as an officer by another corporate officer (most likely the CEO) exercising authority to appoint subordinate officers pursuant to authority delegated by or pursuant to the bylaws. *See, e.g.*, PUBLIC COMPANY ORGANIZATIONAL DOCUMENTS: MODEL FORMS AND COMMENTARY 49–50 (Robert Walmsley ed., 2009) (not identifying general counsel as a required officer and permitting authorization of the president or other officers "to appoint other officers").

33. Veasey & Di Guglielmo, *supra* note 17, at 13 ("[T]he board of directors should have approval responsibility for selecting, retaining, and compensating the general counsel.").

34. Kim, *supra* note 1, at 1056.

35. *Id.*

36. *Id.* at 1057.

a normal event.[37] All of these assertedly positive consequences would presumably reduce the incidence of the behaviors that prompt the proposed reform, namely "lawyers facilitat[ing] illegal transactions or fail[ing] to act to protect the organizational client."[38]

III. Critique of Re-situating General Counsel

There are a number of reasons, however, to be skeptical that re-situating control over the general counsel from the CEO to an independent board committee would achieve the perceived benefits identified above, or that any such benefits would outweigh the costs of that reconfiguration. Some of these reasons address whether the proposed reform would have the intended positive effects. For example, and as Kim anticipated, some might contend that independent directors are themselves largely captured by management, and thus could not effectively elicit greater independence of general counsel by taking over responsibility for hiring and supervising general counsel.[39] In fact, Kim asserts confidently (although without citation) that the provisions in Sarbanes-Oxley designed to promote audit committee independence have not been enough to prevent or undo the committee's capture by senior management.[40] On the other hand, Kim maintains—and will get no dispute here—that independent boards are increasingly capable of remedying managerial misconduct.[41]

Others have suggested other reasons for questioning whether general counsel could ever be well-situated to act as gatekeepers for promoting legal compliance. Professor John Coffee posed the question, "[C]an the in-house counsel replace the outside lawyer/statesman as a gatekeeper?"[42] His response is that "in-house general counsel seems even less suited to play a gatekeeping role," (a) because of the pressures that Kim so carefully reviews, and (b) because "the in-house counsel is seldom a reputational intermediary . . . because the in-house counsel cannot easily develop reputational capital that is personal and independent from the corporate client."[43] Kim cogently responds with a variety of reasons why outside law firms' supposed superiority due to

37. *Id.*
38. *Id.* at 985.
39. *Id.* at 1058–59.
40. *Id.*
41. *Id.* at 1060.
42. John C. Coffee Jr., Gatekeepers: The Professions and Corporate Governance 195 (2006).
43. *Id.*

preservation of reputational capital may no longer hold true,[44] but she does not claim that inside counsel are more motivated than outside law firms by reputational considerations.[45]

It may ultimately not be fully productive, however, to focus on whether or why re-situating control over the general counsel might achieve the anticipated benefits, or whether or why the general counsel would be a good vehicle for achieving those benefits. Even in the absence of doubt on those two points, it would be critical to focus on the costs to the corporation of the proposed reform. In other words, it is important to examine the positive utility of the role of general counsel in circumstances, as under current practice, in which it is the CEO who largely controls the hiring and supervision of the general counsel.

As recently observed, and despite extensive media coverage and academic study of the failings of in-house counsel as gatekeepers, "little attention is given to the various benefits in-house counsel generate."[46] Thus, although Kim lucidly documents some of the biases to which inside counsel are subject, there is another well-known cognitive bias that may affect the reactions of those who, post-crisis of one sort or another, have advocated radical reforms of the law and practice governing lawyers. That other bias—"negativity bias"—inclines one (even law professors) to give greater weight to negative events in decision-making and elsewhere and to minimize the relative significance of positive events.[47] Indeed, the first two sentences of Kim's paper may well reflect such bias, by generalizing about the behavior of lawyers based on reference to the perceived bad behaviors of a few: "One thing we learned from the recent wave of corporate scandals is that lawyers behaved badly. More specifically, inside lawyers behaved badly."[48] Kim stoutly resists any effort to limit the lessons of Enron et al., urging as a central thesis that failures of lawyering result from endemic tendencies, not aberrational vice.[49]

44. Kim, *supra* note 21, at 424–26 (questioning the empirical basis for Coffee's reputational capital story, and noting that reputational damage can be limited through public relations management and that law firms may increasingly care more about promoting a reputation for devotion to clients than promoting a reputation for independence).

45. *Id.* at 426.

46. Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 141 (2011).

47. Paul Rozin & Edward B. Royzman, *Negativity Bias, Negativity Dominance, and Contagion*, 5 PERSONALITY & SOC. PSYCHOL. REV. 296, 297 (2001); *see also* Roy F. Baumeister et al., *Bad Is Stronger than Good*, 5 REV. GEN. PSYCHOL. 323, 323–25 (2001).

48. Kim, *supra* note 1, at 984 (footnotes omitted).

49. *Id.* at 1076.

Perhaps Kim did not intend to suggest that lawyer misconduct has been widespread, and she may well be correct in asserting that insufficiently independent and assertive in-house lawyers may have contributed to, or at least accommodated, at least some of the frauds that emerged from 2001 to 2002. She may also be correct in asserting that such lack of independence and assertiveness is a function of psychological pressures applicable to in-house counsel generally and cannot appropriately be dismissed as the result of isolated instances of venality. Whether or not failures of lawyering by in-house counsel have been widespread, Kim may be right that where such failures have occurred, the institutional aspects of the role of in-house counsel, aspects shared by inside counsel generally, have contributed to such failures.

Negativity bias, however, may tend to obscure other profoundly important, positive results of the traditional relationship between general counsel and senior managers, results that stem from positive aspects of the relationship that share the same coin with the disabling biases that Kim describes so thoroughly. As Professors Omari Simmons and James Dinnage suggest, "Legal observers who remain skeptical of the in-house counsel role in corporate governance need only ponder what corporate culture would be like in the absence of in-house counsel, with only rationally-bound, third-party gatekeepers, regulators, institutional investors, and other corporate constituents to rein in corporate opportunism."[50]

That suggested thought exercise draws attention to what may be an inevitable and irresolvable tension in the role played by general counsel. General counsel's proximity to and familiarity with senior management can (and surely does) generate deference—undue, at times—to the wishes and perceptions of senior management. That deference, in turn, may from time to time result in failures on the part of inside counsel to recognize and interdict improper corporate behavior. Yet at other times, that same proximity and familiarity can (and surely does) also generate both access to information (including information about inchoate transactional plans) and respect for the guidance supplied by general counsel—access and respect that would not be as readily accorded to a general counsel more generally perceived and situated as a "cop" or "gatekeeper."

Kim acknowledges at least part of this risk. She explains the possibility that "corrupt" senior management could simply choose not to consult with inside counsel, and thereby circumvent counsel's gatekeeping influence.[51] She counters, however, that "most significant

50. Simmons & Dinnage, *supra* note 46, at 134.

51. Kim, *supra* note 1, at 1062.

frauds require substantial cooperation or acquiescence from inside lawyers,"[52] and that it would not be easy for a CEO to circumvent a general counsel by hiring a new counsel for advice on a sensitive and possibly illegal course of conduct.[53] But that is hardly the only way in which general counsel could be denied access to information. More likely, general counsel would lose the benefit of the informal communications from senior managers that invariably emerge in the context of a relationship of trust and confidence.

This is the central issue raised by this Essay with respect to any proposal to re-situate control over the general counsel from senior management to independent directors. As Kim recognizes, the capacity, and not just the willingness, to monitor for misconduct is a key quality of an effective gatekeeper.[54] In this regard, Kim and others pervasively and appropriately acknowledge the importance of inside lawyers' informal access, through their "on-site" position within the organization to "back channels" and other useful sources of information about corporate behavior.[55] What may not be sufficiently examined, however, is the collateral effect on such access that might result from re-situating control of general counsel's hiring and supervision. It certainly cannot be assumed that a radical alteration in the relationship between general counsel and senior management will have no impact on general counsel's access to internal corporate information.

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52. *Id.* Kim quotes Professor Koniak for the proposition that "without lawyers, few corporate scandals would exist and fewer still would succeed long enough to cause any significant damage." *Id.* at 1062 n.481 (quoting Susan Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 195 (2003)). This is a remarkably optimistic statement about the sphere of lawyers' influence, a statement that might be expected to have been accompanied by some degree of systematic empirical support, or at least an acknowledgment of uncertainty. Professor Koniak provides none, however, aside from a review of the Enron situation, and Kim adds nothing to back up that remarkable statement. *Cf.* Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323, 328 (2004) ("Lawyers were not the cause of the misconduct at Enron and the like, and it is questionable whether counsel could have prevented the crimes that occurred.").

53. Kim, *supra* note 1, at 1063.

54. Kim, *supra* note 21, at 421, 459 (noting the potential for management to circumvent monitoring by in-house counsel, but explaining that "the inside lawyer, through her superior capacity to monitor via informal information channels, will often learn of such gaming and thus may be tougher to circumvent").

55. *Id.* at 453 ("[A]ccess to information turns also on informal channels of communication, [and b]ecause the inside lawyer is physically proximate to those who hold information about misconduct, she may learn of misdeeds during her trips to the local 'water cooler.'" (quoting Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1018 (1997))).

To the contrary, it is suggested that the collateral effect of re-situation on such access would be substantial and negative, although difficult to test or predict. Addressing a similar issue (the potential perverse consequences of requiring lawyers to report out client misconduct), Professor Mark Sargent explained this concern well:

> Corporate managers may exclude lawyers from their most sensitive discussions. They may divide legal work among a larger number of firms, creating a compartmentalization that prevents anyone from developing a sense of the whole picture. Once a new type of transaction is developed with lawyers' assistance, clients may exclude lawyers from future iterations, as the client manipulates the transaction in ways the lawyers would not have expected or approved. Managers also may engage in even more determined efforts to hide the true facts from their lawyers. The net result is that lawyers might have less of an opportunity to influence their clients' actions positively than they do now.[56]

There is evidence, moreover, both anecdotal and more sweeping, that access to information correlates directly with the level of trust and confidence reposed by the source with the recipient. Facebook usage and practice reflect this correlation: users often enable sharing of personal information with designated friends, but preclude others (notably parents, where the users are their children) from accessing that information.[57] A little closer to the subject at hand, our law of attorney-client privilege in relation to corporate clients rests in significant part on a belief in the existence and strength of the correlation between trust and confidence in the lawyer and the organizational representative's willingness to share information. The core premise of the attorney-client privilege is that the relationship of trust and confidence between lawyer and client will promote legal compliance, by encouraging the

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56. Mark A. Sargent, *Lawyers in the Perfect Storm*, 43 WASHBURN L.J. 1, 42–43 (2003); *see also* Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 467 (2006) ("To the extent lawyers gain the option, or are required, to control the client's actions . . . , the client will be less inclined to turn to the lawyer for advice until consultation is necessary for legal representation. . . . [T]he existence of coercive authority gives clients an incentive to minimize the information in a single lawyer's hands.").

57. *See, e.g.*, Stan Schroeder, *Facebook Privacy: 10 Settings Every User Needs to Know*, MASHABLE.COM (Feb. 7, 2011), http://mashable.com/2011/02/07/facebook-privacy-guide/ ("[Y]ou might want to customize the settings and set a certain type of content to be visible to the people on some of your lists, and invisible to others. For example, only my close friends can see all my photos, while business associates can see just a few.").

client—including the representatives of an organizational client—to communicate fully with counsel.[58] If the intimacy of the relationship between the general counsel and the chief executive officer and other senior officers is unimportant, the law of attorney-client privilege in the corporate context has grossly misapprehended good public policy.[59]

Apart from the law of attorney-client privilege and its rationale, there are anecdotal indications that the willingness of senior managers to provide information critical to effective promotion of good corporate conduct is dependent upon their trust and confidence in inside counsel, particularly the general counsel, and that such trust and confidence (and resulting access to information) are impaired by general counsel's assumption of an actively independent or even adversarial "cop" role in relation to senior management. One such anecdotal indication may be supplied by the reader's own answer to the following question: in a situation involving potentially adverse regulatory consequences (e.g., financial penalties or even imprisonment), is it more comfortable, other things being equal, to share personal and confidential information about the situation with a policeman or regulator or with a close friend?[60]

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58. *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("[The attorney-client] privilege 'is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.'" (quoting *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888))); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 73 cmt. b (2007) ("The attorney-client privilege encourages organizational clients to have their agents confide in lawyers in order to realize the organization's legal rights and to achieve compliance with law."). For references to studies questioning the efficacy of the privilege, however, see *infra* note 64.

59. This policy choice is not universally adopted. In 2010, the European Court of Justice confirmed that in-house counsel lack independence from senior management and communications between such counsel, and managers therefore do not merit application of the attorney-client privilege. *See* Case C-550/07, *Akzo Nobel Chems., Ltd. v. European Comm'n* (Sept. 14, 2010), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-550/07. "[A]n enrolled in-house lawyer, despite his membership of a Bar or Law Society and the professional ethical obligations associated with such membership, does not enjoy *the same degree of independence* from his employer as a lawyer working in an external law firm does in relation to his clients. Consequently, an enrolled in-house lawyer is less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of his client than an external lawyer." *Id.* ¶ 61. For a communication between counsel and client to be privileged, "it must be a communication with an independent lawyer, that is to say with a lawyer who is 'not bound to the client by a relationship of employment'." *Id.* ¶ 54. Kim, however, has quite effectively challenged the court's premise that "an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client." *Id.* ¶ 61; Kim, *supra* note 21, at 412–14.

60. Zacharias poses a similar question: Would "an employee in an Enron-like scenario who has doubts about his employer's accounting practices . . . be more likely

In a somewhat different context, however (the potential that beefed-up whistleblowing protections for inside counsel would discourage communication from corporate agents), Kim presents several challenges to the idea that protecting lawyers who whistleblow would chill communication from other organizational constituents.[61] Those challenges are addressed here only to the extent that they could be read to argue also against the concern expressed above about chilling communication resulting from re-situating control of the general counsel.

Kim argues first that the concern about impaired communication to organizational counsel "profoundly misunderstands the nature of modern corporate frauds, which require substantial cooperation or acquiescence from lawyers."[62] This argument seems a bit hyperbolic, if not off point: however important the participation of lawyers may be, the mere need to engage with counsel doesn't mean that corporate officers, when engaged with counsel, will always be fully forthcoming with relevant information. It is at least possible that they will be less forthcoming with a general counsel perceived as a "cop" than with a general counsel perceived as a trusted confidante.

Next, she argues that concern about client reticence is "highly speculative."[63] A fair point, this is: it would be helpful to have more informative empirical evidence on the matter, but in the absence of such evidence, it is at least as speculative to conclude that re-situating control of general counsel will have no effect on informal cooperation and sharing of information by management.

Citing studies questioning the effect of the attorney-client privilege on client candor with counsel, Kim points out that organizational clients can waive applicable privilege, so that individual managers cannot necessarily count in any event on the confidentiality of their communications with organizational counsel.[64] This too is a fair point, but again, it does not directly address the point made here: even if the salience of confidentiality and privilege to corporate managers were attenuated to the point of insignificance, candid communication with

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to discuss the matter with a non-lawyer co-worker who shares his interests . . . or with a lawyer freighted with the obligation to act on information regarding wrongdoing?" Zacharias, *supra* note 56, at 471.

61. Kim, *supra* note 1, at 1069–71.

62. *Id.* at 1070.

63. *Id.*

64. *Id.* (citing William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142–43 (1988); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 163–65 (1993); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 377–96 (1989)).

counsel could still be more likely to be forthcoming where counsel is perceived as supportive and sympathetic, rather than as a distant and adversarial monitor.[65]

In any event, enhanced access to client information is not the only potential benefit of a close relationship between the CEO and the general counsel that could be diminished by re-situating general counsel under the control of independent directors. To be an effective promoter of good corporate behavior, the advice of general counsel must be received by other senior managers with a degree of trust and respect. This is an element of what Kim identifies as the capacity to interdict—that is, the effectiveness of the gatekeeper in being able to prevent misconduct.[66] Again, a hypothetical question to the reader may illustrate the point: is a suggestion that some course of conduct may be improper and should be avoided more likely to be accepted and internalized if received from a close friend, or from someone perceived as an enforcer whose incentives include avoiding potential liability for any failure to stop improper conduct?

In light of the foregoing considerations, it is not at all surprising to read of survey evidence that only seventeen percent of in-house counsel consider it their primary function to act as a "cop" in relation to the conduct of the corporation's officers and employees.[67] To the contrary, it is quite plausible to conclude that this relatively low identification with the primary "cop" role stems at least in part from a perception that inside counsel can be more effective in fulfilling their role as counsel if they are perceived by corporate constituents, notably senior managers, as confidantes with shared perspectives and goals.

The more that inside counsel, and general counsel in particular, are institutionally established as gatekeepers at arm's length from organizational constituents, particularly CEOs, the less likely it is that such counsel will obtain information and be heeded with respect to advice on sensitive issues of corporate compliance and responsible

65. Kim advances two other arguments in this area, but they appear more directed at the value of confidentiality than the value of trust and confidence more generally. She suggests that communications about "how to avoid penalties for breaking the law"—presumably post-misconduct communications and thus "the least desirable form of communication"—would be the most affected and deterred by a whistleblowing mandate. *Id.* at 1070. Again, this point does not appear to address directly the effect of re-situating general counsel on the level of senior manager candor with general counsel. Finally, she cautions that confidentiality should not be viewed as an end in itself. *Id.* at 1069–71. Agreed.

66. Kim, *supra* note 21, at 421.

67. *Id.* at 445 ("In 2000, interviews with 86 informants from approximately 46 Fortune 1000 companies reported that 17 percent of inside counsel identified their *primary* concern as *policing* the conduct of their co-agents." (citing Nelson & Nielsen, *supra* note 13, at 460–61, 463, 468)).

behavior.[68] Re-situating general counsel to report to a committee of independent directors is thus potentially counterproductive to the goal of relying on general counsel to promote such behavior.[69]

IV. ALTERNATIVE MEASURES TO ENHANCE GENERAL COUNSEL'S INDEPENDENCE

For the reasons described in the preceding Section, there may be undesirable costs in re-situating to independent directors the responsibility for hiring and oversight of general counsel. In contrast, there are quite a few measures, many not widely practiced, that boards of directors and senior management might usefully consider as means to promote general counsel's independence and contribution to effective corporate governance, without totally foregoing the potential value of situating general counsel in an active advisory relationship of trust and confidence with senior management. Several such measures are reviewed below.

A. Identifying General Counsel's Independence as a Norm

As Kim points out, "socially defined role ideologies can lend ideological legitimation to a given style of lawyering,"[70] including a tendency to view law as an obstacle to achievement of the client's interests. As she also points out, "agents and subordinates readily accept the 'definition of the situation' advanced by their de facto

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68. *See* Zacharias, *supra* note 56, at 470 ("The more that lawyers are perceived to be potential monitors of the organization rather than team players within it, the more likely they are to become marginalized.").

69. The more intriguing question is the one noted by Profesor Don Langevoort in his contribution to this Symposium. Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 493. Langevoort notes the "robust debate among compliance professionals as to whether the [chief legal officer] should [be] walled off from too much influence over the corporate compliance and ethics function." *Id.* at 498. If the compliance function involves "policing," there is at least an argument that the function should be performed by a "cop," and not by or under the supervision of general counsel. As Langevoort points out, on the other hand, separating general counsel from the compliance function sends the unfortunate message that the attorney-client relationship is an ethics-free zone. *Id.* at 500.

70. Kim, *supra* note 1, at 1012 ("[A] key variable in determining the strength of an agent's accountability to her principal is her understanding of the nature of her role as attorney and the ideological or normative commitments that such a role entails—role ideology.").

principals and superiors."[71] If those two propositions are correct—and they are at least plausible—it must also be true that an ideological anti-compliance bias can be mitigated, at least to some extent, by the simple expedient of encouraging organizational constituents to recognize it and explicitly discourage it. Thus, a constructive strategy for boards of directors, and CEOs as well, may be to more explicitly reinforce and normalize the view of the inside lawyer as the "persuasive counselor."[72] Under that approach, inside lawyers do not merely "describ[e] the law and suggest[] ways to comply with it," but "affirmatively, proactively, and courageously try to persuade their clients to follow the law, to go beyond mere compliance with the law, and even to 'do the right thing' from a moral or ethical perspective."[73] That approach to lawyering—in which lawyers engage in "moral dialogue" with their clients—can be embraced by corporate leaders as a welcome form of behavior.[74]

How best to establish that approach as a norm is less easy to determine, but a number of mechanisms come to mind. At the simplest level, a board of directors could articulate, by resolution or otherwise, the expectation that (1) the general counsel, in discharging her responsibilities as such, is to exercise independent judgment and promote legally compliant behavior at all levels of the corporation, and (2) the CEO and other senior officers will encourage the general counsel in this respect.[75] Of course, saying doesn't always make it so, but if norms matter and agents accept the mission as defined by principals and superiors, saying so—at least when superiors do it—does matter. And as shown below, there are plenty of contexts and means for the norm of general counsel independence to be articulated where the articulation can most likely make a difference.

71. *Id.* at 1017 (citing Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 527 (1985)).

72. Veasey & Di Guglielmo, *supra* note 17, at 28.

73. *Id.* at 30.

74. *E.g.*, Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U. L. REV. 275, 305 (2011) (citing THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 66–67 (1994)); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering,* 104 YALE L.J. 1545, 1546–48 (1995)) ("Lawyers can influence their clients through conversation and counseling—the 'moral activism' noted above.").

75. *See* Heineman, *supra* note 26 (urging companies to "*have the CEO recognize [the need for independence] when they hire general counsels*, to have the board recognize it when it talks to the CEO about hiring general counsel").

B. Involving Independent Directors in Selecting General Counsel

One of the approaches to fostering a norm of general counsel independence is affording the board of directors, and independent directors in particular, a role—not an exclusive role, to be sure, but a significant role—in the process of hiring general counsel. That role could have many facets, as previously noted in the discussion of current practices in hiring general counsel.[76] At one end of the spectrum, the board, or a committee of independent directors, could formally approve (or disapprove) the CEO's hiring decision.[77] While that secondary approval authority may frequently amount to little more than a rubber stamp, conferring such authority on independent directors may have two salutary effects: it provides an occasion to express and reinforce to both the CEO and the incoming general counsel the norm of general counsel's responsibility to the corporation to exercise independent judgment; and it may discourage the CEO from attempting to hire general counsel who is perceived to be likely, due to her personal attributes or situation, to be insufficiently independent of management.[78] At the other end of the spectrum, but potentially in addition to the formal role discussed immediately above, independent directors could be consulted by the CEO, formally or informally or both, about the choice of general counsel, as the job description and search are being constructed, and before the CEO's choice is presented to directors.

Somewhere in between these measures is the step of including independent directors in the process of interviewing candidates for the position of general counsel, either separately or with the CEO, or both. Likely benefits of this step are the same as other approaches that visibly and meaningfully involve independent directors in the process of hiring general counsel: reinforcing the norm of general counsel independence and discouraging the retention of general counsel who appear likely not to exercise independent judgment on behalf of the corporation.

C. Involving Independent Directors in Compensating General Counsel

How a person is compensated for services and who determines that compensation undoubtedly affect the person's biases and behavior. It is thus not implausible to assert that excessive authority on the part of the

76. *Supra* notes 25–27.

77. This sort of approval role is what the ABA Task Force recommended. *See ABA Task Force Report*, *supra* note 28, at 160–61.

78. *See McAlevey*, *supra* note 26 ("[General counsel] has to be viewed as independent by the board and senior management.").

CEO to determine the compensation of general counsel may impair general counsel's ability to exercise and bring to bear judgment independent of the CEO. A board of directors that is concerned about such impairment may thus wish to consider two compatible approaches to the determination of the general counsel's compensation.

First, and without substituting their control for that of the CEO, independent directors may wish to consider participating in some way in determining the general counsel's compensation. The board of directors may take on the function of providing advice and consent, on an ongoing basis, with regard to compensation of the general counsel.[79] Second, and regardless of who determines it, the general counsel's compensation could usefully be structured in ways that make it at least somewhat less susceptible to diminution by the CEO—especially *post hoc* diminution by a CEO who is displeased with a display of independence by a general counsel. Thus, it may be useful to compensate general counsel through "value-based compliance metrics, restricted stock with holding periods, enhanced severance, and sign-on bonuses" that would reduce any compensation-based incentive on the part of general counsel to refrain from identifying and asserting positions contrary to those initially espoused by senior management.[80] Although it may be plausible to try to structure general counsel's compensation to reward "outstanding legal work,"[81] "as distinct from pure financial performance,"[82] such a criterion presumably should not be left to the unreviewable discretion of a CEO administering and determining that compensation, because of the potential that such control might diminish rather than promote general counsel's independence.

D. Establishing a Strong Relationship between the CEO and the General Counsel

The general counsel's ability to achieve the stature and access to information enabling her to most effectively counsel the corporation is widely and plausibly viewed as dependent on the establishment of a

79. *Id.* ("The board should be advised of how the general counsel is selected and how the general counsel is compensated and then provide advice and consent.").

80. Simmons & Dinnage, *supra* note 46, at 141–42. One recent study that examines incentive compensation to general counsel finds that "performance-based incentives enhance the internal monitoring function, perhaps by providing incentives for better monitoring efforts or by facilitating the selection of more talented monitors." Chris Armstrong et al., *Performance-Based Incentives for Internal Monitors* 3 (Rock Ctr. for Corporate Governance, Working Paper Series, No. 76, 2010).

81. Barclift, *supra* note 17, at 25.

82. Veasey & Di Guglielmo, *supra* note 17, at 13.

close working relationship with the CEO, a relationship in which the general counsel is expected to engage in an advisory function with the CEO and other senior officers, rather than simply manage delegation of responsibility for providing legal services to the corporation.[83] In many corporations this sort of relationship already exists: there is somewhat dated survey evidence that the general counsel reports directly to the CEO in a majority of companies.[84] A more recent publication by a leading search firm suggests that a close CEO/general counsel relationship is normally expected.[85] In any event, a direct and close relationship with the CEO can only enhance the general counsel's stature and authority within the company, not to mention her or his access to corporate strategy development and critical internal information. Indeed, placing the general counsel in a position remote from the CEO could be viewed as a negative step from the standpoint of promoting corporate compliance.[86]

E. Promoting Direct Consultation between Independent Directors and General Counsel

Establishing a direct relationship between general counsel and independent directors is also likely to enhance general counsel's stature and ability to exercise and promote independent judgment. It has been recommended that boards of directors establish regular opportunities for the independent directors to consult with the general counsel in an

83. COFFEE, *supra* note 42, at 225 (reporting a survey by the American Corporate Counsel Association indicating that in nearly forty percent of the cases in-house general counsel does not have direct access to the corporation's senior executive officer).

84. Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 612 (2002) (reporting that 61.4% of general counsel report to the CEO, and another 15.3% report to the president).

85. VICTORIA REESE & LEE HANSON, THE GENERAL COUNSEL IN 2011: A RAPIDLY EXPANDING ROLE (2010), *available at* http://www.heidrick.com/PublicationsReports/PublicationsReports/HS_GeneralCounsel2011.pdf ("[M]any CEOs are looking for that kind of relationship with the General Counsel—for someone who can act as a sounding board, a confidant, as well as a trusted legal advisor of impeccable integrity. . . . CEOs want someone who is comfortable working with the senior executive team—who . . . should also have personal chemistry with the CEO and senior management; otherwise, success in the highly sensitive role of Chief Legal Officer is unlikely.").

86. Simmons & Dinnage, *supra* note 46, at 146 ("Anything less than [having general counsel report to the board of directors or at least the CEO] will inhibit the functioning of the value-creation attributes that are vital to in-house counsel effectiveness.").

"executive session,"[87] outside the presence of the CEO and other senior managers.[88] As explained when it recommended this approach in 2003, the ABA Task Force on Corporate Responsibility suggested that such regular communication between independent directors and general counsel would make it easier for general counsel to alert those directors to serious issues of corporate compliance in a manner that would be less likely to be viewed by CEOs and management as an attempted coup and would facilitate the directors' informed evaluation of a potential problem brought to their attention by the general counsel.[89] In fact, normalizing direct communication between the general counsel and the board of directors is one of the principal benefits that Kim advocates in support of her more sweeping proposal to re-situate control of the general counsel.[90]

It is not clear, however, that this recommended practice has been widely adopted. Although executive sessions of independent directors are mandated by stock exchange rules,[91] and are reflected in published corporate governance principles and guidelines,[92] such publications rarely if ever indicate that general counsel are routinely invited to consult with the directors in such sessions outside the presence of the

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87. *See* Fred Wilson, *The Executive Session*, MYVENTUREPAD.COM/FREDWILSON (Apr. 30, 2010), http://myventurepad.com/fredwilson/38480/executive-session ("The term executive session is an oxymoron because it is a meeting of all the board members other than the executives of the company.").

88. *ABA Task Force Report*, *supra* note 28, at 163.

89. *Id.* at 164.

90. Kim, *supra* note 1, at 1057.

91. *See* N.Y. STOCK EXCH., LISTED COMPANY MANUAL, R. 303A.03 (2012), *available at* http://nysemanual.nyse.com/LCMTools/bookmark.asp?id=sx-ruling-nyse-policymanual_3&manual=/lcm/sections/lcm-sections/ ("To empower non-management directors to serve as a more effective check on management, the non-management directors of each listed company must meet at regularly scheduled executive sessions without management.").

92. *See, e.g.*, *Board of Directors Corporate Governance Policies*, DISCOVER FIN. (Jan. 22, 2009), http://www.discoverfinancial.com/company/governanceGuidelines.shtml ("Non-employee directors must meet regularly in Non-Employee Director Sessions without management present."); Humana Corporate Governance, *Corporate Governance Guidelines*, HUMANA.COM (Aug. 26, 2010), http://media.corporate-ir.net/media_files/irol/92/92913/pdf/Corporate_Governance_Guidelines.pdf ("Non-management members of the Board shall regularly meet in executive session (without members of management being present)."); Walgreen Co., *Corporate Governance Guidelines*, INVESTOR.WALGREENS.COM (July 12, 2011), http://investor.walgreens.com/common/download/download.cfm?companyid=WAG&fileid=145606&filekey=27d0eb95-0542-44b9-84c0-a5faa78d49af&filename=Guidelines.pdf ("Independent directors meet in regularly scheduled sessions in conjunction with each quarterly Board meeting, and at other times at their discretion.").

CEO.[93] It may be, however, that companies have adopted that practice and simply not made explicit reference to it in their public documents.

None of the measures discussed above, or even all of them in combination, will eliminate all corporate misconduct: "one-hundred percent compliance is not a realistic expectation for any compliance program in a complex organization."[94] On the other hand, some of those measures that may make general counsel's allegiance to the entity more salient may well also have a tendency to reduce the level of trust and confidence in the relationship between the CEO and the general counsel. DeMott points out, for example, that even involving the board in the choice of general counsel—let alone requiring that independent directors take over the hiring and supervision of general counsel—"may weaken the bonds between the CEO and general counsel, as would instituting a practice of regular meetings between general counsel and a committee or other group of independent directors."[95] Nevertheless, experimentation with potentially erosive but incremental measures is much less likely to eliminate the benefits of that trust and confidence than a wholesale re-situation of control of the function of general counsel. At a minimum, it is suggested that such incremental measures be fully explored and tested before embarking, legislatively or otherwise, on imposing a mandate that independent directors take on exclusive control over the hiring and supervision of general counsel.

CONCLUSION

Legal academics have thoroughly inventoried the effects of socialization of the general counsel through daily interactions with the CEO and other senior corporate officers and the potentially resulting biases that may disable general counsel from providing actively independent counsel. Such assessments have led mainstream commentators on corporate governance to urge that the board of directors, comprised of a majority of independent directors, play an active role in approving the retention of general counsel. At the same time, Congress has aggressively reallocated to independent directors (and away from the chief executive officer and the senior management team) important and often primary responsibilities in retaining and supervising the work of outside providers (independent auditors and

93. A review of the published corporate governance principles or guidelines of fifty randomly selected listed companies did not reveal any explicit provision for a procedure in which general counsel attended all or part of the meetings of independent directors in executive session.

94. Simmons and Dinnage, *supra* note 46, at 120.

95. DeMott, *supra* note 17, at 980.

compensation experts) whose services are called upon at least in part as a check against misbehavior or misappropriation by the CEO and other senior corporate officers. It is thus not surprising that some have called for a similar approach to the retention and supervision of the general counsel: specifically, for allocating those functions exclusively to independent directors.

Such a reallocation would be a mistake, resting on a misapprehension of the role of general counsel and the manner in which general counsel most effectively contribute to legally compliant corporate behavior. The positive influence of general counsel does not depend on reinforcing an aggressively independent posture relative to senior management. To the contrary, such a posture would unduly undermine the web of interactions that generate senior management's trust and confidence in the general counsel. Correspondingly and counterproductively, the most likely practical outcome of such a posture would be a reduction in general counsel's access to information and the planning function of senior management, and in general counsel's ability to promote desirable corporate behavior.

General counsel's effectiveness as counselors of compliance depends instead on senior management's trust and confidence. This dependence on trust thoroughly distinguishes general counsel from others (notably outside auditors) who have been identified as "gatekeepers" charged with acting independently from senior corporate officers. The general counsel cannot be recast as a "cop" without losing the considerable benefits of her ability to counsel senior management and promote lawful behavior from that position and perspective.

This position is not oblivious to the reality that the very proximity that fosters trust by senior officers also tends to limit and occasionally impair general counsel's ability to exercise independent judgment. Rather than address that tendency by radically re-situating general counsel's position in the corporation, however, the better approach is to evaluate and, if appropriate, implement one or more of a series of more modest measures to promote an independent and consistent solicitude by general counsel for the interests of the client—the corporation—where management's personal, parochial interests are at odds with that paramount objective of general counsel's representation. Rather than suddenly transform the ethical ecology of general counsel, it is proposed here that this ecology be encouraged to evolve in a way that shores up general counsel's solicitude for the interests of the client—the organization—without sacrificing the benefits to the organization of a close relationship with senior officers.