

Partner or GC?

The move from law firm partner to general counsel is not always the best choice, suggests legal services adviser Steven A. Lauer



When looking for an individual to serve as a company's general counsel, corporate executives have several possible sources of candidates. On some occasions, they have selected or considered lawyers who currently serve as law firm partners. They might look to the law firms that already represent the company or to firms in the wider market.

Such a choice can lead to some positive and, one should recognise, negative effects. Since some of the negative effects may be less obvious, it's worth reviewing them explicitly, along with the benefits. The final choice should reflect a determination that the company will realise the greatest value, taking into account both the associated benefits and costs.

Value benefits

By selecting a lawyer who is currently a partner in a law firm, corporate executives may be seeking to enhance the stature of the company's law department. Since law firm partners occupy – at least in the eyes of many observers – a relatively high position in the legal pecking order, such a choice might elevate the reputation of that law department.

At one time, the outside bar frequently and deridingly referred to corporate counsel by the very un-PC term of 'kept women'¹. By contrast, the partner in a law firm might possess a network of contacts – in other law firms, companies and government agencies – that would serve the company well.

A company might expect that hiring a law firm partner as general counsel will lead to a reduction in its cost for legal services. If that partner has been representing the company and charging it on an hourly basis, he or she would cease to bill the company on that basis upon becoming general counsel. Because the direct cost of having a lawyer on staff is less than the cost of 'buying' the same amount of time from an outside lawyer with equivalent qualifications, this seems to represent an easy gain for the client. This assumes, of course, that the general counsel would have sufficient work to remain at least as busy as he or she was or would have been as outside counsel.

If the general counsel's salary were US\$500,000 a year (including benefits),

as an example, that would equate to US\$250 an hour (assuming 50 forty-hour weeks, not including any overhead costs). Partners in substantial law firms typically bill at considerably higher rates (often in excess of US\$500 per hour).

This rosy picture, however, masks some negative impacts of such a move.

Possible costs

If a law firm partner is brought into an existing law department as general counsel, the other attorneys in that department might perceive that choice as an adverse reflection on them and on their future prospects in the company. Advancement within a law department can be notoriously slow due to the typically small size and the much smaller number of senior positions compared to junior positions.

“Because the direct cost of having a lawyer on staff is less than the cost of ‘buying’ the same amount of time from an outside lawyer with equivalent qualifications, this seems to represent an easy gain for the client.”

It's interesting to note that Morgan Stanley, at the same time that it selected Cravath, Swaine & Moore partner Frank Barron as its chief legal officer in July 2010, appointed its general counsel of the Americas to its management committee. Without suggesting or intending to imply any criticism of that in-house attorney, did that appointment represent a recognition by the company that selecting a top attorney from outside the law department's ranks might lead to consternation among the incumbent in-house attorneys and thus an attempt to avoid or minimise any internal dissension?

Regardless, the disruption within a corporate law department of bringing in an outsider must be weighed in the calculation. If that disruption leads to the departure of one or more of the incumbent attorneys, especially among the more senior members of the department, the value of the department after those departures should be taken into account.

The perceived cost savings described above may prove to be somewhat ephemeral. As a partner in a law firm servicing a client, a lawyer presumably personally handles only the legal work of that client appropriate to her position. Upon becoming general counsel, she may have to devote much time to managing the department, which will not call upon her substantive experience and specialty (although that expertise probably formed the basis of the company's decision to hire her as general counsel).

Will the move toward the administrative and managerial responsibilities of a general counsel position move that attorney from her most valuable contribution to the company's law-related needs to one outside her zone of expertise? That lawyer might be worth US\$500 or more per hour when providing that specialty service, but is that lawyer as valuable when handling the myriad other responsibilities of a general counsel? If the management responsibilities of the general counsel crowd out the time available for her to attend to her substantive specialty, will the company's decision lead to more expense rather than less, because it will need to supplement her time in that specialty area?

Value adjustments

If a law firm partner possesses talent for managing legal services, he may be able to adapt readily to the role of an in-house general counsel. However, the skills needed to succeed in a law firm environment may be very different than those needed to excel as an in-house attorney. Accordingly, corporate executives should recognise the need to assess a candidate's talents other than those with which he succeeded as an outside attorney when considering that individual for a general counsel role.

An attorney who has progressed within a law firm to partner status and has acquired a substantive specialty with which he delivers considerable value to clients might deliver less value to one of those clients as its general counsel. The efficiency that he has achieved as an expert in a field of law may be of far less utility in the in-house position. Instead, he might occupy more of a 'novice' role in respect of many of the

management duties of a general counsel, with which he is far less familiar.

The law firm partner who has achieved such a specialty will likely be well regarded by his clients for the advice and counsel that he can provide in the context of that substantive specialty. That advice and counsel will provide great value when delivered within the scope of the attorney/client privilege, because the protection of that privilege permits the client to explore, with counsel's assistance, the legal ramifications of various courses of action without fear of that counsel being forced to disclose those discussions to government authorities or to other parties to litigation.

However, the European Court of Justice recently made an important distinction between in-house and outside counsel (at least within the European Union). The court stated in *Akzo Nobel Chemicals Ltd et al. v. European Commission* that in-house communications "do not merit the protection afforded by legal professional privilege, no matter how often they are made, how highly significant they are or how useful they are to the undertaking" (see 'EU ruling on in-house legal privilege to benefit law firms', p.4).

If a company selects as its general counsel a law firm partner whose counsel and advice have served it well, the company might find that its ability to receive such advice from that attorney as general counsel will be more circumscribed than was possible before that selection. Thus, that attorney might become less valuable to the company as general counsel than he had been previously on account of the possible disclosure later of communications that might have otherwise been protected from such disclosure.

Cultural conflicts

Another issue is that selecting a partner from a law firm to serve as a company's general counsel might be perceived as creating a prospective advantage for that partner's law firm in securing legal work from that company. In today's fiscal environment, a primary responsibility of in-house counsel is to secure the talent and resources appropriate to the task at hand, whether from a law firm

or another source.² If a law firm has or is perceived to have an advantage in securing work that is not related to its capabilities for that work or to any valid selection criterion, the selection process will be distorted and the company's interest in securing the best service might be compromised.

Operating within a corporate environment is very different from operating as a member of a law firm. A law firm exists on account of its attorneys and, enabling them to perform their work with little if any regard for cost, represents normal operating procedure. A corporate law department, on the other hand, is a service to benefit the operating and other units of the company. As such, it must operate within that corporate environment and the financial constraints that accompany that position.

“A partner in a law firm receives considerable deference within the firm due to his status as an owner of the firm. An attorney accustomed to such deference might find the limitations of a law department surprising and disconcerting.”

For example, a decision to hire additional in-house lawyers must face the same scrutiny as would staff augmentation in other departments and compete for corporate resources as well. A law firm, in meeting its clients' existing and expected service needs, will make decisions on hiring more freely since additional attorneys will presumably represent additional sources of professional billings and revenue, which would not be the case for a law department.

Also worth considering is that a partner in a law firm receives considerable deference within the firm due to his status as an owner of the firm. An attorney accustomed to such deference might find the limitations of a law department surprising and disconcerting. Fighting for corporate resources or the attention of the

business professionals may require an adjustment of expectations, and not all attorneys can or want to make such an adjustment.

In-house attorneys deliver their greatest value by virtue of understanding the full breadth of a company's operational and regulatory concerns and applying the law in that context. If a new general counsel has a background in one or only a few limited areas of specialty or expertise, even ones that are significant to a company, will he or she be able to acquire the broad overview necessary to fully advise senior management about the full panoply of concerns that too often loom on a company's horizon?

Parting thoughts

The choice of an individual to serve as a company's general counsel has great significance for the company, its employees, the incumbent in-house attorneys (if any), the company's board of directors, its regulators and other constituencies. Selecting the right individual for that role requires an analysis of many factors and considerations.

Ultimately, the goal is to secure for the company the most value for the choice. Only by weighing the positive and negative impacts of a decision can corporate management assure themselves and those who watch their deliberations closely that the choice will turn out to be the right one.

While a partner in a law firm should not face disqualification on account of that status, one should also recognise that such a choice does not guarantee a correct choice. Weighing the upsides and downsides of that choice will best position the company to emerge from the selection process to maximum benefit. mp

- SLAUER@CAROLINA.RR.COM

Endnotes

1. See C Liggio, 'A Look at the Role of Corporate Counsel: Back to the Future - or is it the past?', 44 *Ariz. L. Rev.* 621, 622 (2002).
2. See Lauer, *The Value-Able Law Department*, Ark Group (2010) and Lauer, 'What Is The Most Important Task of In-House Counsel?', *Corporate Counsel's Quarterly*, vol. 19, no. 2 (April 2003), p. 73.