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Wise Counsel:
General Counsel for Small and Mid-Size Law Firms

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One of the most important institutional developments in law firm risk management over the past 25 years has been the rise of in-house general counsel at law firms.[1] Law firm general counsel have allowed firms both to offer proactive advice on a range of issues and to better coordinate their response when events such as claims occur. At the same time, this development has most commonly happened at large firms. Given the increasingly complex environment all law firms face, small and mid-size firms also benefit from having at least part-time in-house general counsel. This column looks at three related questions: (1) why do small and mid-size firms need general counsel? (2) what benefits do they offer? (3) who should be chosen as general counsel?

Why?

A Harvard Law School study in the early 2000s aptly summarized the principal reasons leading to the development of in-house general counsel at large law firms:

> "Most commentators attribute firms' increasing reliance on in-house compliance specialists to the increasing complexity of professional regulation and the increasing number of claims against lawyers. 'It's a dangerous world that large law firms are in now,' says one managing partner. 'We are attractive defendants.'"[2]

It is safe to say that the environment for law firms—large, small and in-between—has not gotten any simpler since the Harvard study. Moreover, what may have seemed like "big firm" problems at the time of the Harvard study now confront many small and mid-size firms with equal measure.

On the regulatory front, many small and mid-size firms have taken advantage of more available reciprocal admission to practice across state boundaries even if they do not have multiple offices. Although the professional rules in most jurisdictions—including Oregon, Washington and Idaho—are now based on the ABA Model Rules of Professional Conduct, nuances and their accompanying "traps for the unwary" remain in individual state rules.[3]

Claims, and their regulatory cousin, bar complaints, show no signs of abating and, at least in terms of frequency, impact small and mid-size firms more than large firms. Although Professional Liability Fund annual reports do not break claims out by firm size, the PLF compiles statistics by practice area. "Retail" practice areas that are often the domain of small and mid-size firms such as family law, bankruptcy, personal injury and estate planning made up over 50 percent of the claims handled for the five-year period ending December 31, 2016.[4] The annual reports of the Oregon State Bar's Client Assistance Office, which is the intake point for regulatory complaints in Oregon, include firm size as

a metric and reported that for calendar year 2016 99 percent of complaints were against lawyers at firms of 100 or smaller.[5] The CAO complaint statistics should be viewed in context. The CAO report reflects that less than two percent of Oregon lawyers practice at firms of more than 100 lawyers. That also serves as a reminder that most lawyers in Oregon practice in firms that fit the definition of small and mid-sized.

Two other trends affect small and mid-size firms as well as their large firm counterparts: increased lawyer and staff mobility and technology.

On the former, "the ties that bind" aren't what they used to be. Lawyers and staff at small and mid-size firms often have the same diverse set of relationships as at larger firms, including "contract" lawyers and staff and "non-equity" partners. An unscientific search through common electronic databases will yield a variety of claims against law firms large and small for employment-related issues.[6] Similarly, lawyers now move more frequently between firms of all sizes than in the past. Although some transitions are uneventful, others are not and lead to litigation.[7]

On the latter, technology has brought a host of new risks to law firms of all sizes in addition to its benefits. Both the national and local legal press have reported that cyber attacks are increasingly targeting law firms.[8] The PLF, for

example, reported four claims by Oregon firms in 2016 under the cyber security rider offered by its excess program.[9] Further, the professional rules in the form of RPC 1.6(c) now charge lawyers with a specific responsibility to "make reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

In sum, small and mid-size firms now face many of the same risks as their large firm counterparts.

What Benefits?

Having a general counsel offers two key benefits to a firm: (1) someone who is responsible for coordinating internal legal work; and (2) the ability to cloak internal legal advice within privilege.

Coordination. The moment a fire breaks out is usually a bad time to pick a fire chief. Like a fire chief, a general counsel can first focus on the law firm equivalent of "fire prevention"—implementing protocols appropriate for firm size on conflicts checks, developing form engagement agreements, handling lateral-hire screens and providing advice to firm lawyers and staff to avoid problems from happening in the first place. Again like a fire chief, a general counsel is a point of contact in "fighting fires"—interfacing with the PLF and any other carriers, coordinating outside counsel and advising firm management.

Privilege. In *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 326 P3d 1181 (2014), the Oregon Supreme Court recognized that law firms possess their own attorney-client privilege for confidential communications between firm lawyers and designated internal counsel on legal matters affecting the firm. This allows a general counsel to have the hard conversations with firm lawyers that are the hallmark of the attorney-client privilege. Although some courts have recognized ad hoc designations of firm lawyers to handle particular matters, privilege is more likely to be confirmed if the person consulted has been officially designated as general counsel (or similar title) by the firm.[10]

Who?

In choosing a general counsel, three words predominate: competence; communication; and credibility.

Competence. The person selected must know what they are doing. That does not necessarily mean that they need to be an expert in each area of their portfolio. Although many general counsel are litigators by training, business lawyers can be equally effective. General counsel are also often able to rely on other expertise within the firm that they may not personally possess, with, for example, a real estate partner assisting on office lease renewal negotiations. Regardless of practice background, the person chosen needs to have the blend

of substantive knowledge and practical experience that translates into sound judgment.

Communication. Even the best technical knowledge will not be effective if other firm members do not consult the general counsel. The person chosen, therefore, should have a sufficiently good "bedside manner" that they can diplomatically but effectively convince their own partners what is good for them—and the firm. The person chosen should also be sufficiently "approachable" that a junior associate or a staff member with concerns will be comfortable in discussing them.

Credibility. The lawyer chosen has to have credibility within the firm. In a law firm setting, credibility means more than simply providing sound advice. The general counsel has to have the backing of firm management and the other lawyers need to know that. Sound advice is more likely to be followed in this context if the lawyers on the receiving end know that the general counsel speaks for the firm.

ABOUT THE AUTHOR

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[1] *See generally* Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 Ariz L Rev 559 (2002) (Chambliss & Wilkins) (reporting results of a study undertaken by Harvard Law School's Program on the Legal Profession).

[2] Chambliss & Wilkins, *supra*, 44 Ariz L Rev at 560 (footnotes omitted).

[3] *See generally* Mark J. Fucile, *"Model" Doesn't Mean "Uniform": The Continuing Importance of State Variation*, 21, No 2 ABA Professional Lawyer 20 (2012) (using the Northwest for examples of state variation in lawyer regulatory rules).

[4] OSB PLF 2016 Annual Report at 2 (2017).

[5] OSB CAO 2016 Annual Report at 6 (2017).

[6] *See, e.g., Williams, Love, O'Leary, & Powers, PC v. Brann*, No. 11-3279, 2013 WL 145508 (Bankr D Or Jan 11, 2013) (unpublished) (litigation over payments due contract lawyer).

[7] *See, e.g., Gray v. Martin*, 63 Or App 173, 663 P2d 1285 (1983) (dispute between law firm and departing partner over fee revenue); *Hagen v. O'Connell, Goyak & Ball, P.C.*, 68 Or App 700, 683 P2d 563 (1984) (dispute between former law firm shareholder and the firm over valuation of the departing lawyer's interest).

[8] Julie Sobowale, *Cyber Risk: Large or Small, Law Firms Are Learning They Must Deal with Cybersecurity*, 103, No 3 ABA J 34 (2017); Emilee S. Preble, *Anatomy of a Cyber Claim*, PLF In Brief, August 2017 at 1 (Preble).

[9] Preble at 5.

[10] *See, e.g., United States v. Rowe*, 96 F3d 1294 (9th Cir 1996) (ad hoc designation). In either event, the client of internal counsel is the firm. *See* ABA Formal Op. 08-853 (2008) (discussing in-house consulting on ethics issues at law firms).