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## General Counsel As Persuasive Counselors

# Tom Gottschalk: What Makes A Counselor Persuasive

*The Editor interviews Thomas A. Gottschalk, Of Counsel, Kirkland & Ellis LLP and former Executive Vice President and General Counsel, General Motors Corporation.*

**Editor:** Norm Veasey talks about the role of a general counsel as a “persuasive counselor.” How important is that role, and what should the general counsel bring to the table to fulfill it?

**Gottschalk:** Norm describes a role that is critical both to ensuring timely compliance with legal and ethical standards, but also important to good corporate governance and good business management. Many general counsel come to be regarded as valued counselors by their CEOs often with respect to business strategies as much as legal or ethical questions. Lawyers are usually seasoned counselors by the time they get to be general counsel. Their experience and expertise make their judgment and perspective particularly valuable so it is not unusual for them to be invited into the CEO’s inner circle of advisors.

Another factor in this is that the role of the CEO itself has changed. Today, more than before, the CEO is more of a political figure than an authoritarian. CEOs have to be consensus builders and learn the art of compromise to some extent. They lead by listening, assimilating, and figuring out how to move groups – externally, as well as internally. They actively seek input from advisors with varying backgrounds to inform their judgment and their tactics. In publicly held companies, CEOs live in an environment where they not only need to focus on the bottom line, they have to be very alert and sensitive to how the media perceives them, politicians regard them, and the public reacts to them.

The learning experiences lawyers go through with their clients over their careers often make them very attuned to these types of issues, because such sensitivities affect how courts react to their cases, how the media will report on them, and how ultimately the clients will view the lawyer’s effectiveness. You can win a legal battle, but still lose a public relations war. Whether something is technically doable or not is only the starting line in considering whether something should be done or how to do it.

There has to be thoughtful consideration of the consequences of proposed actions. An executive may be legally entitled to huge compensation, or it may be permissible to hold an annual meeting in a small conference room with only the secretary present, but in today’s times those may not be smart actions to take. Lawyers are not the only counselors CEOs should draw upon, but because of their training and background, seasoned lawyers are frequently able to bring that perspective into their everyday advice more so than many others.

As a result, CEOs and Boards are increasingly looking for people with innate, or well developed, and broad-gauged counseling ability to serve as general counsel. It is one reason they look to people with wide ranging backgrounds including public service or as leaders in prominent law firms.

**Editor:** How can general counsel be effective as persuasive counselors for the Board?

**Gottschalk:** General counsel cannot be shy about voicing their opinions, but they need also to recognize that they do not always have all the facts and considera-

tions when called upon for advice and to be respectful that their role is only that of advisor, and not decision maker. What makes them persuasive is the thoughtfulness of the views they express; what makes them effective is the respect with which the client, represented by the CEO or Board, accords their views.

To be effective with the Board, general counsel must candidly, succinctly and helpfully raise and discuss sensitive and important issues with directors which help them fulfill their roles in the corporation. While this can create tension between the CEO and general counsel, I had a supportive CEO at GM who encouraged me to build good rapport with directors. A general counsel who has the Board’s confidence can be very helpful to the CEO. I became a reliable, objective source of information about some Board attitudes and concerns, and provided another perspective about them and how to deal with them.

**Editor:** Should the Board be involved in hiring, firing, and compensating the general counsel?

**Gottschalk:** No question, yes. As a senior officer of the corporation whose client is the corporation and whose ultimate authority is the Board, the directors should be satisfied with the CEO’s choice for general counsel. At GM and I think most publicly held corporations, the Board actually elects the general counsel on recommendation of the CEO and the general counsel’s compensation is usually reviewed and approved by the Board or a Board committee along with those of other senior officers. A prudent CEO will always consult with the Board as to the reasons for terminating a general counsel, or otherwise risk

creating issues and a possible loss of confidence by the Board in the CEO.

**Editor: How important is it that the general counsel meet in executive session with the Audit Committee and interface directly with independent directors?**

**Gottschalk:** From an Audit Committee perspective, it must be done. An Audit Committee which doesn't do so ignores best practices under Sarbanes Oxley and passes up an opportunity to see compliance and other issues from an important and informed source – the general counsel. As for independent directors, I think it is healthy from everyone's perspective for independent directors to have direct contacts with the general counsel, and vice versa. Open exchanges of information and views should help build the Board's confidence in the general counsel and should help the general counsel advise both the Board and the CEO more helpfully. The CEO should normally be kept apprised of the substance of such contacts with independent directors.

**Editor: What effect do "up the ladder" reporting obligations have on the general counsel's ability to be an effective counselor?**

**Gottschalk:** The concern is that the general counselor will be viewed as a "snitch" for the Board and hence may be shut off from receiving candid information by others in the company. On the other hand, it can be argued that it will cause others to "straighten up and fly right" in their business dealings to avoid being called to the Board's attention. In actual practice, it depends more on how the general counsel works the process, than on the structure of the process. Without overplaying their hand, general counsel can counsel the business side to think in terms of possible Board reaction in deciding what course to take or recommend, by asking whether the company would be doing the "right thing," and thinking through the potential downsides even though the proposed action may be lawful. By helping management get the Board comfortable with proposed actions, or with corrective measures once a problem has surfaced, as well as assuring that the Board is adequately informed, the general counsel becomes a valuable and often persuasive counselor. Counseling as to possible required disclosures prior to deciding on an action serves a similar prophylactic role with management.

**Editor: Should general counsel attend meetings of the Board and its committees?**

**Gottschalk:** Certainly, they should attend Board meetings except for Executive Sessions which do not involve legal or fiduciary issues. To perform the role of persuasive counselor, the general counsel must be aware not only of what is being considered at the highest levels of the company, but what questions and concerns are being raised. Such awareness is crucial to the basic role of the general counsel which is to assure that the company and especially the Board are properly advised with respect to the legal and fiduciary implications of their actions. It is also essential to enable the lawyer to reflect on matters coming to the Board and provide the broader-gauged advice to management in shaping its presentations and recommendations and to the Board in acting on them. To be effective, you have to know what matters are coming to the Board in advance in order to assure that necessary information is provided, to anticipate questions, and to be in a position to offer helpful counsel during the Board's deliberations.

As to committees, there are some the general counsel or a designated lawyer should attend, including audit, governance, and compensation. It is usually not feasible for the general counsel to attend all committees and it may be sufficient for the general counsel to simply review materials going to certain committees in advance and to learn afterward what actions, if any, were taken.

**Editor: What about senior management meetings?**

**Gottschalk:** There should be an understanding between the CEO and general counsel as to which management meetings the general counsel should attend. Major strategic meetings, such as monthly executive committee meetings or strategic planning meetings, should include the general counsel so as to assure timely raising of legal concerns, as well as to inform the general counsel as to what are the business objectives and strategies and allow him or her to provide perspective and advice. As a persuasive counselor, the general counsel can help shape strategies to achieve those business objectives most effectively. It is part of your job to be an active and helpful member of management.

**Editor: Corporate social responsibility is getting increased attention. What role should general counsel play?**

**Gottschalk:** The best lawyers provide advice rooted in the law, but beyond the law. They have a broader vision which comprehends how conduct will be perceived by others from an ethical and fairness perspective. This perspective is very helpful to corporations which want to highlight their contributions and responsibility to society. Good corporate reputations curry favor for your products and services. Bad ones cut the other way, and even negatively influence judges, regulators, and legislators in matters affecting your company. General counsel can be supportive of enlightened corporate policies and practices, and can counsel against actions which will be perceived as disrespectful of people or the environment. They can also encourage their legal staffs and outside law firms to lead by example and contribute in their own ways to community betterment, for example, through pro bono activities, and to professional goals, such as civility and diversity.

**Editor: What roles do the in-house legal staff and outside counsel play in helping the general counsel be a persuasive counselor?**

**Gottschalk:** It's hard enough to be persuasive – you cannot be pervasive and counsel on everything. You need to draw upon the expertise of your staff and occasionally outside counsel to inform your own judgment before providing advice to the corporation. You also want these other lawyers to develop their own skills as persuasive counselors so it is good to give them those opportunities directly, even with the Board. Allowing the directors to hear directly from a lawyer more expert than you in a particular field respects the role the directors have and also builds their confidence in you that you will assure that they always have access to expert advice in matters where they should have it. Moreover, you as general counsel must assure that there is adequate legal coverage of the company's business activities. Once I heard a general counsel say that in view of budget cutbacks, they had to deny legal services to some business units. Today, a general counsel should resign before tolerating a situation where managers run "blind" of the law.