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## If Multidisciplinary Partnerships Are Introduced Into The United States, What Could Or Should Be The Role Of General Counsel?

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# ARTICLE

## IF MULTIDISCIPLINARY PARTNERSHIPS ARE INTRODUCED INTO THE UNITED STATES, WHAT COULD OR SHOULD BE THE ROLE OF GENERAL COUNSEL?

*Michele D. Beardslee\**

### INTRODUCTION

This Article is not about whether or not Multidisciplinary Partnerships (MDPs)<sup>1</sup> should be introduced into the United States

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1. MDP is defined by the ABA Commission on Multidisciplinary Practice as follows:

[MDP] denotes a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing non-legal, as well as legal services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.

ABA, *A Primer on Multidisciplinary Practice* [hereinafter ABA, *Primer on MDP*], available at

<http://www.acca.com/protected/legres/mdp/hackett.html> (on file with author); ABA Commission on Multidisciplinary Practice, Report: Hypotheticals and Models (1999) [hereinafter ABA Commission on MDP], available at <http://www.abanet.org/cpr/multicomhypos.html> (last visited Sept. 1, 2003).

The ABA uses the acronym MDP to refer to multidisciplinary practices. In this Article, however, MDP stands for "multidisciplinary *partnerships*" (as

marketplace, nor is it concerned with predicting if MDPs will actually be introduced into the United States. Instead, this Article addresses what could or should happen to the role of General Counsel if MDPs are introduced into the United States. Will the role of General Counsel be affected? What ought the role of General Counsel be? How should General Counsel prepare for the introduction of MDPs? In sum, this Article addresses the opportunities and risks General Counsel will face if MDPs enter the U.S. marketplace and provides recommendations for how General Counsel should prepare for the possibility of MDPs.

Is asking "what could happen if" a useless exercise? It did not seem so when I was doing this research back in April 2001. At that time, it appeared to many professionals that MDPs were inevitable. An "MDP phenomenon" was already pervasive in the United States despite the fact that the Bar had not sanctioned MDPs.<sup>2</sup> Moreover, the U.S. marketplace was feeling pressure from other countries and undergoing changes that indicated U.S. law firms and Professional Service Firms (PSFs) would not be competitive if MDPs were not formed.<sup>3</sup> A great deal has

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opposed to practices) because scholars have noted that the term multidisciplinary practice refers to "an activity, whereas the term multidisciplinary partnership is in reference to the legal relationship among those providing the services." Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547, 1547 n.1 (2000) [hereinafter Terry, *German MDPs*].

2. Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 872-79 (2000) [hereinafter Terry, *A Primer on MDPs*]:

The Commission's hearings, together with extensive anecdotal evidence, convince me that there is an MDP phenomenon (*i.e.*, a significant number of lawyers are now working outside of law firm settings, doing work that would be considered the practice of law if done by lawyers in a traditional law firm). Although the MDP phenomenon has been visible longer in Europe than in the U.S., the MDP phenomenon appears to have significant momentum in the U.S.

*Id.*; see also John H. Matheson & Peter D. Favorite, *Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors*, 32 LOY. U. CHI. L.J. 577, 577-78 (2001) (noting the "apparent inevitability of MDP-reform" and that "in practical terms, the revolution in legal services known as 'MDPs' is already here").

3. See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership*, 13 GEO.

changed, however, in the past eighteen months. Now, after the collapse of Enron and WorldCom, the movement towards MDPs is less intense and more questionable.<sup>4</sup> The collapse of Enron, however, does not make the questions this Article addresses moot. In fact, it is disasters like Enron, WorldCom, and even the terrorist attacks of September 11 that prove that we should prepare for possibilities and what-ifs. The corporate world, in response to Enron, is doing just that by passing laws (*e.g.*, the Sarbanes-Oxley Act), forming task forces on Corporate Responsibility, and urging companies to adopt a variety of "best practices" in corporate governance.<sup>5</sup> No one wants to be caught off-guard again. Hence the topic of this Article: General Counsel

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J. LEGAL ETHICS 217, 233 (2000) [hereinafter Daly, *Choosing Wise Men Wisely*]; Michael Roster et al., Remarks at the ACCA's 1999 Annual Meeting in San Diego regarding the implications of Multidisciplinary Practice on in-house counsel [hereinafter Roster, ACCA Remarks], *available at* <http://www.acca.com/protected/pubs/docket/ma00/mdp.html> (on file with author).

The big law firms are not doing the best job. They need to do a lot more, and . . . become competitive with the accounting firms and consultants who are taking over the corporate law practices around the globe . . . what's driving the MDP movement is capital . . . Lawyers need to become competitive with other disciplines by being more efficient with the internet, raising more capital through mergers, and start moving toward joint venturing with other disciplines to provide the positive benefits sought through the MDP movement.

*Id.* (statement of William Ide III). See also Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 222 (describing a typical scenario "to plan an orderly testamentary disposition of her assets, the owner of a small business may require coordinated advice from a lawyer, a financial planner, and a business consultant . . . the clients' efforts to coordinate the advice from non-affiliated professionals raises ultimate costs of the services and is replete with inefficiencies"); ABA, *Primer on MDP*, *supra* note 1 (noting that "individual clients need coordinated advice from a variety of professionals including lawyers, financial planners, accountants, social workers and psychologists.").

4. See generally, *e.g.*, Nathan Koppel, *Paper Tigers*, AM. LAW. (Nov. 2002).

5. John K. Villa et al., *Recent Proposals for Changes in Corporate Governance, Securities Disclosure, Public Auditing, and the Role of Corporate Counsel: A Snapshot as of July 22, 2002*, *available at*

[http://www.acca.com/legres/enron/acca\\_update.pdf](http://www.acca.com/legres/enron/acca_update.pdf) (on file with author).

should prepare for the possible introduction of MDPs<sup>6</sup> so that they can protect and enhance their role within the companies that they work.

I began this project in the spring of 2001 with the following three theories:

**Theory #1:** Companies that hire MDPs could benefit from having an MDP Quarterback, a point-person to manage service projects by MDPs and guard against the risks they pose such as conflicts of interest, lack of lawyer independence, breach of client confidentiality, damage to the legal profession's reputation, and the unauthorized practice of law.

**Theory #2:** General Counsel are uniquely positioned to take on the MDP Quarterback role.

**Theory #3:** If General Counsel do not seize the opportunity to expand their role and influence, the introduction of MDPs could jeopardize General Counsel's control over and influence on the legal and business work they perform for their clients.

To test my theories, I began by researching what other scholars had written on the topic of MDPs and General Counsel. Given the importance of General Counsel within the legal profession and the attention drawn to the MDP topic back in spring 2001, I was surprised to find very little written on the subject of my Article.<sup>7</sup> Specifically, I found only five sources that

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6. After writing this Article, the author came across an article that recommended that the legal profession prepare for MDPs. See Matheson & Favorite, *supra* note 2, at 578 ("We suggest that interested legal professionals devote considerable time and energy not merely to continuing discussions and debate, but to actually prepare for the reality of multidisciplinary practice.").

7. Susan S. Samuelson, Book Review, *Sally Gunz's New Topics for Research in Legal Studies: The Role of Corporate Counsel*. *The New Corporate Counsel*, 30 AM. BUS. L.J. 335, 337 (1992) (commenting that "despite their importance within the profession, [in-house counsel] have been the subject of little research, and most of that has been anecdotal, not empirical."); see also Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1067 (1997) [hereinafter Daly, *The Role of the General Counsel*] ("Unfortunately, scholarly writers and researchers have paid

even remotely addressed the subject of how the introduction of MDPs into the United States may affect the General Counsel's role.<sup>8</sup> Therefore, I reviewed sources that addressed the two topics separately and then I gathered primary research. I conducted eighteen personal telephone interviews (averaging about one hour in length) with twelve General Counsel, one Associate General Counsel, one Vice President of Legal,<sup>9</sup> three Professional

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very little attention to the combined effect of the growth in number, prestige, and power of in-house counsel and the globalization of the business and capital markets . . . This is a subject that cries out for greater empirical research and scholarly analysis.").

8. The author found five sources that addressed the effect that MDPs might have on General Counsel's role, but it was not a main topic in any of them: Daly, *Choosing Wise Men Wisely*, *supra* note 3; Roster, ACCA Remarks, *supra* note 3, *Touting for Fear: MDPs and In-House Lawyers*, available at [http://www.lawdepartment.net/scripts/article.asp?Article\\_ID=12206](http://www.lawdepartment.net/scripts/article.asp?Article_ID=12206) (on file with author); Josephine Carr & Adam Frederickson, *Surviving in the New Europe: Strategies for European Firms*, available at [http://www.lawdepartment.net/scripts/article.asp?Article\\_ID=8145](http://www.lawdepartment.net/scripts/article.asp?Article_ID=8145) (on file with author); Summary of the Testimony of Ms. Elizabeth Wall Before the Multidisciplinary Practice Commission [hereinafter Wall Testimony], available at <http://www.abanet.org/cpr/wall1198.html> (last visited Sept. 1, 2003).

9. Telephone Interview with AnonymousR, General Counsel & Executive Vice President of a Financial Corporation in California (Mar. 28, 2001); Telephone Interview with AnonymousJ, General Counsel, Sr. Vice President & Secretary of a U.S. subsidiary of a Japanese trading company located in New York (Mar. 27, 2001); Telephone Interview with AnonymousO, General Counsel, Sr. Vice President & Secretary of a global company in New Jersey (Mar. 29, 2001); Telephone Interview with AnonymousMc, General Counsel, Exec. Vice President & Secretary of a large bank in California (Mar. 30, 2001); Telephone Interview with AnonymousT, General Counsel & Vice President of a licensing and manufacturing company in San Francisco, California (Mar. 28, 2001); Telephone Interview with AnonymousM, General Counsel & Sr. Vice President of a large clothing manufacturer located in California (Mar. 29, 2001); Telephone Interview AnonymousB, VP-Legal HSB/WWOPs of a large computer corporation (Mar. 30, 2001); Telephone Interview with AnonymousL, Senior Vice President & General Counsel of a large wireless company (Mar. 30, 2001); Telephone Interview with AnonymousF, Vice President and General Counsel of a large pharmaceutical company (Apr. 3, 2001); Telephone Interview with AnonymousJJ, Chief Legal Officer & President of an Internet communications company located in Virginia (Mar. 28, 2001); Telephone Interview with AnonymousD, General Counsel, Sr. Vice President & Corporate

Service Firm Managers,<sup>10</sup> and one Chief Financial Officer.<sup>11</sup> The sample is small,<sup>12</sup> and therefore anecdotal. As other scholars have claimed in the past about similar sample sizes and methods, however, this research still “provides a useful start for an analysis”<sup>13</sup> of the effect MDPs could and should have on the role of General Counsel.<sup>14</sup>

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Secretary of a software, Internet and manufacturing company located in New York (Mar. 20, 2001); Telephone Interview with AnonymousY, Associate General Counsel of a large agricultural company (Apr. 2, 2001); Telephone Interview with AnonymousK, Executive Vice President and General Counsel, of a large retailer located in Illinois (May 3, 2001); Telephone Interview with AnonymousH, General Counsel & Sr. Vice President of a legal professional organization (Mar. 20, 2001) [collectively hereinafter General Counsel Interviews] (interview transcripts on file with author).

Note that there are two people in the author’s sample that are not the General Counsel or chief legal officer. AnonymousY is an Associate General Counsel that reports to the CEO, has prior experience as a General Counsel, and 23 years of work experience. AnonymousB is the VP of Legal, was a partner at a large law firm, and has 17 years of experience. Given the depth and breadth of their experience and current roles within their respective companies, these two Corporate Counsel are treated in this Article as part of the General Counsel sample.

10. Telephone Interview with AnonymousE, Global Managing Partner for a professional service firm in Illinois (Mar. 29, 2001); Telephone Interview with AnonymousW, Marketing Director of a professional service firm in Massachusetts (Mar. 30, 2001); Telephone Interview with AnonymousLU, Managing Director of professional service firm in Michigan (Apr. 1, 2001) [collectively hereinafter PSF Manager Interviews] (interview transcripts on file with author).

11. Telephone Interview with Desiree DeStefano, former Chief Financial Officer of Sports Capital Partners located in New York (Mar. 28, 2001) [Hereinafter Telephone Interview with DeStefano] (interview transcript on file with author). Ms. DeStefano no longer works for this company.

12. The sample, however, is diverse in that the General Counsel interviewees worked for a mix of large- (over 10,000 employees), mid- (between 1,000 and 10,000), and small- (under 1,000 employees) sized companies. Six of the General Counsel interviewees worked for large companies. Seven worked for mid-sized companies, and only two worked for small companies. Note that all interview sources are, at the time of publication, anonymous. To identify any of the interviewees, the author must contact each individual for approval.

13. See Terry, *German MDPs*, *supra* note 1, at 1589 (noting that although her “sample was small, and [her] results necessarily anecdotal, [the] interviews nevertheless provide a useful start for an analysis of the German MDP

In addition to finding support for all three of my original theories, I uncovered something unexpected with my research. General Counsel were not, as I had anticipated, preparing for the introduction of MDPs. All were familiar with the issues around the formation of MDPs (*e.g.*, conflicts of interests, confidentiality, lawyer independence). Some had considered the risks MDPs might pose to their sphere of influence in their companies, but none was trying to get ahead of the curve. None was stepping forward to prepare for the risks or to take advantage of any potential opportunity MDPs might pose. Given that General Counsel have been recognized as leaders of the legal profession,<sup>15</sup> I had assumed that General Counsel would at least be thinking about how they might proactively change their role to meet the new demands posed by MDPs. They, however, were not. They had not considered MDPs as an opportunity to expand their role in the companies in which they worked.

In light of Enron, it is this discovery—the discovery that General Counsel were not preparing for MDPs or stepping forward to protect their companies and their role within them—which breathes new life into the research I conducted a year and a half ago. Contributing to the fall of Enron is the failure of any one person in management to accept “primary responsibility for oversight” and the narrow interpretation of roles and responsibilities.<sup>16</sup> What the Enron review committee uncovered is

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experience”). Terry interviewed approximately thirteen attorneys and one legal ethics experts. In addition, she spoke thirteen times in Germany about MDPs and conducted question and answer sessions afterwards. *Id.*

14. For more information about the sample, see *infra* Appendix.

15. For example, the whole concept of billable hours was driven by General Counsel. See Susan Hackett, *The Future of In-House Law Departments*, Presentation at Harvard Law School (Feb. 27, 2001), at 7 [hereinafter Hackett, *The Future of In-House Law Dep'ts*]; see also Samuelson, *supra* note 7, at 336 (stating that “over the past twenty years, corporate counsel have had a profound influence on the legal industry.”).

16. William C. Powers, Jr. et al., Report of Investigation by the Special Investigative Committee of the Board of the Directors of Enron Corp., at 10 (Feb. 1, 2002) [hereinafter Powers, Report of Investigation].



the same as what I did: no one had “stepped forward.”<sup>17</sup> To that end, the Enron debacle does not make my findings moot but instead strengthens my belief that General Counsel (along with other business managers) should prepare for what might happen if MDPs are introduced. If MDPs are introduced in the United States, companies can benefit from an MDP Quarterback, and this person could and should be the General Counsel.<sup>18</sup>

Part I of this Article describes my vision of the MDP Quarterback position and briefly reviews research that supports my first theory (companies can benefit from having an MDP Quarterback). Part II presents research supporting my second theory (General Counsel are uniquely positioned to be the MDP Quarterback). Part III exposes the risks MDPs may pose to General Counsel’s role, power, and influence (my third theory). Finally, Part IV concludes by recommending steps General Counsel can take to prepare for the introduction of MDPs.

## I. COMPANIES CAN BENEFIT FROM HAVING AN “MDP QUARTERBACK”

### A. What Is an “MDP Quarterback”?<sup>19</sup>

An MDP Quarterback is an internal senior level manager that oversees the hiring of all PSFs and MDPs and manages the

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17. *Id.* (finding that “no one in Management had stepped forward to address the issues as they arose, or to bring the apparent problems to the Board’s attention.”).

18. There are many different ways in which MDPs might be organized. The ABA Commission on Multidisciplinary Practice has outlined five models of operation. See ABA Commission on MDP, *supra* note 1. This Article generally assumes the fully integrated model of MDPs; however, the theories and recommendations are also applicable if other models are used. See Matheson & Favorite, *supra* note 2, at 608 (claiming that “regardless of the form that MDP first takes, it can benefit greatly from the presence of independent directors” that are looking out for the challenges that MDPs pose).

19. The author first heard the term “MDP Quarterback” during a discussion at Harvard Law School with Professor David Wilkins. Together, with the help of Susan Hackett and the author’s research, Professor Wilkins and the author developed the definition of the role.

portfolio of service agreements entered into by the company. The primary purpose of the MDP Quarterback is to manage the legal and financial risks that are involved in any major project that is outsourced. The secondary purpose of the MDP Quarterback is to guard against overlap and inefficiencies that can result when different groups have hired different service firms to work with the company.<sup>20</sup>

The MDP Quarterback does not decide which jobs are outsourced or which service firms are hired. Instead, the MDP Quarterback works with other senior managers to help determine what their companies need from MDPs and PSFs and which managers should be on the cross-functional teams that work on the projects. Specifically, the MDP Quarterback would not control whether or not the marketing department could hire a consultant to help on a project nor would he/she weigh in on the final negotiated price for a thirty-second NBC television commercial. Instead, the MDP Quarterback would help lead the marketing department to the right provider of services and help funnel any information about other ongoing projects that might be useful for the proposed project. He/she would guide the department in their choice of providers to ensure the company was optimizing its current agreements with the service providers already hired. After the MDP is hired, he/she would stay on the project's cross-functional team to help identify and manage any overlap and risks.

The MDP Quarterback role is most appropriately assigned to a senior manager within the company who has a thorough understanding of the company's business and overarching goals and strategies. This person should be someone who knows how to and has the respect and power to lead cross-functional teams, manage risks, and recognize the complexities involved with lawyers working with non-lawyers in MDPs. This person should be neutral and work in a department that is independent from the

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20. See discussion, *infra* Part I.B, for research supporting the idea that risks, overlap, and inefficiencies are created when a company hires more than one PSF/MDP, or hires one PSF/MDP to do more than one type of service project.

focus of the majority of the company's service projects.<sup>21</sup> Ideally, this person should be an attorney because attorneys know how to safeguard the ethics of the profession, ethics that are at issue with MDPs. Only an attorney can "ensure procedures for preserving client confidences, independent legal judgment, and professional objectivity," and recognize the unauthorized practice of law.<sup>22</sup>

B. How Can Companies Benefit from Having an MDP Quarterback?

My personal work experience, my research, and the fall of Enron suggest that companies (especially large ones that use more than one service provider) can benefit from having an MDP Quarterback. Inefficiencies and, more importantly, risks are created when companies hire PSFs or MDPs.

Before law school, I worked for seven years in the marketing field. I first worked at a PSF (Leo Burnett) on projects for Phillip Morris and Kellogg's. Thereafter, I worked in the marketing department of Levi Strauss & Company. I learned first hand that inefficiencies and overlap occur when big companies hire more than one PSF to work on internal projects or when they hire one

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21. The author does not recommend that the MDP Quarterback should be an independent director working without a direct relationship with management because the person, then, would not have the same understanding of the business and its issues nor the same influence on the company as an insider would. Furthermore, as mentioned later, General Counsel already know how to manage relationships where oversight is by non-lawyers while maintaining independence and professional objectivity in the corporate setting. This is not to say that having lawyers act as independent directors in an MDP setting is a bad idea. In fact, as John H. Matheson and Peter D. Favorite point out, using lawyers as independent directors in the creation of MDPs may help "safeguard[] ethical service" and protect against "corruption of the legal profession." Matheson & Favorite, *supra* note 2, at 610-11. Their ideas and the author's ideas are actually not mutually exclusive and arguably would work well together, providing a full circle kind of protection.

22. Matheson & Favorite, *supra* note 2, at 616. Matheson & Favorite recommends using attorneys as independent directors working externally from clients to oversee MDPs. The author's recommendation is to develop an MDP director (a.k.a. Quarterback) that works internally—*i.e.*, from within the client. The author also recommends that this person be an attorney and furthermore, believe that the best attorney for the job is the General Counsel, as will be argued in detail *infra* Part II.

PSF to work on more than one type of internal project (*e.g.*, when they hire one PSF for developing the web site, another for advertising on TV and yet another for database development). Often the service a PSF provides has an impact on another group's work. The project and its results, however, are not shared across departments. Either essential people are left off what is intended to be a complete cross-functional team or information is not appropriately shared throughout the company.

There are at least two reasons for this oversight. First, the internal task force is generally formed and led by the person whose group has the most to gain or lose by the service project. The leader, therefore, has an interest in secluding the information and keeping the teams small because a larger team means approvals are harder to attain, execution is slower, and the potential for ownership, control and recognition is reduced. Second, the internal leader and the PSF consultants often are not in the position to foresee—or do not have the experience or impetus to foresee—the consequences the project may have on other parts of the company.

These problems already occur in companies that hire more than one PSF or that hire the same PSF to complete different projects. If MDPs are added to the mix of service providers that a company hires, the type of inefficiencies will only be exacerbated. My experience suggests that the repetition, inefficiency and oversight described above could be avoided by appointing a neutral,<sup>23</sup> senior-level point person to ensure all groups are represented and all learnings shared with the appropriate departments.

In addition to my own experience, the research I conducted also suggests that an MDP Quarterback would be valuable to certain types of companies (mainly large ones). An MDP Quarterback can help protect the company against ethical, organizational, and legal challenges posed by the formation of

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23. By "neutral," the author means a leader whose department is not the main focus of the service project.

MDPs in the United States.<sup>24</sup> Currently, the service provider itself must develop measures to protect the attorney-client privilege, manage conflicts of interest, safeguard lawyer independence<sup>25</sup> and deal with any other complexities and risks that may develop. Lessons from Enron make clear that companies must protect themselves. They cannot rely simply on the service firm to protect their interests. To that end, many scholars have made recommendations to clients and lawyers about how to combat the problems arising when lawyers work with non-lawyers. These recommendations are tactical in nature such as creating firewalls and instilling a certification process.<sup>26</sup> Because none of the recommendations are foolproof, however, companies can and should consider having an MDP Quarterback, in addition to adopting the recommended tactical controls (which the MDP Quarterback can and should oversee to ensure they are executed properly).<sup>27</sup>

The senior executives interviewed generally agreed that companies can benefit from having an MDP Quarterback. In fact, a role much like the one I have described already exists in some large companies that use PSFs for multiple services. Two of the PSF managers interviewed mentioned that some clients that use their firms for more than one project have a point person that acts like an MDP Quarterback. This manager is responsible for understanding the business and reaching across the organization to find the right talent for the business opportunities presented. This person ensures the people with the right functional expertise are heavily involved in, and/or leading the specific project. This

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24. See Matheson & Favorite, *supra* note 2 (arguing that the legal profession must prepare for MDPs and that an attorney acting as an independent director might be able to protect against these risks to the profession).

25. Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 267.

26. Terry, *German MDPs*, *supra* note 1, at 1619 (recommending certification as a protection tool because it provides education and self-policing and can help guard against violations of ethics rules).

27. See Powers, Report of Investigation, *supra* note 16, at 10 (finding that “[t]hese controls as designed were not rigorous enough, and their implementation and oversight was inadequate at both the Management and Board levels . . . the controls were not executed properly; and there were structural defects in those controls that became apparent over time.”).

person, however, is the central client liaison overseeing all of the service projects provided to the client by this PSF.

The PSF contacts and many of the General Counsel interviewed felt that larger companies and companies that outsourced a large amount of projects to service providers could benefit from an MDP Quarterback. While some of the General Counsel interviewees had doubts about the viability of the role in smaller companies,<sup>28</sup> these General Counsel may feel differently after Enron. The collapse of Enron brought to light that conflicts of interests and other risks occur when companies work with professional service firms. Not only large companies face these risks, as is evidenced by the Sarbanes-Oxley Act, which targets large and small companies.<sup>29</sup> All companies need internal controls to assess and manage risks. Indeed, most companies (at least all of the companies for which the General Counsel interviewees worked)<sup>30</sup> use two types of service firms: a traditional PSF and a law firm. Therefore, it is likely that these companies may use an MDP in the future to provide one or both of these services. There are legal and financial risks when a company hires any type of PSF and, as mentioned above, there is

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28. Some simply did not see a need at their company for a single person to be the MDP Quarterback overseeing all service providers. For example, AnonymousT felt that the MDP Quarterback could benefit other companies, but he did not feel it was necessary at his company in particular because of its size and culture. AnonymousH, on the other hand, felt the viability of the MDP Quarterback role had less to do with the size of the company and more to do with the type of MDPs that are introduced into the U.S. She felt there would be a greater need for an MDP Quarterback if the type of MDPs that dominate the market are large (e.g., the Big 4), as opposed to small (e.g., a partnership between an architect and real estate lawyer); Telephone Interview with AnonymousH, *supra* note 9. Although AnonymousH felt smaller MDPs were more likely to prevail, she said "if [she's] wrong and it jumps into five Wal-Mart [type MDPs], then companies will need someone to manage... [and] make sure that the client is getting the service it needs." *Id.*

29. See generally Securities Exchange Act of 1934, 15 U.S.C. § 78a, amended by 15 U.S.C. § 78c (2002).

30. Only one interviewee, AnonymousT, does not currently outsource any law work, although he has in the past. In terms of PSF usage, all the interviewees who answered the question indicated that their company uses or has used a PSF. Two interviewees—AnonymousH and AnonymousY—did not answer the question.

potential for oversight. These risks and inefficiencies can be compounded when a company hires an MDP, given the potential complexities with lawyers partnering with non-lawyers in MDPs.<sup>31</sup> Therefore, even smaller companies may benefit from having someone in this position.

The fall of Enron supports my premise that companies can benefit from having an MDP Quarterback. The Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corporation pointed out that one of primary reasons for the oversight that occurred with Enron was the lack of one person accepting responsibility.<sup>32</sup> To that end, no one was assigned the job of managing the conflicts of interests that the teams knew about going in to the project.<sup>33</sup> Moreover, as found in the investigation, “no one in Management stepped forward to address the issues as they arose,” and “no one in Management accepted primary responsibility for oversight.”<sup>34</sup> Because no one was assigned the responsibility, no one took the responsibility.

This type of oversight is what the role of MDP Quarterback is designed to combat. This is not to say the Enron crisis would not have happened if someone in management had been assigned responsibility. Many of the transactions (like the one Enron made to Raptor in late 2000 and early 2001) may still have gone unreported to the Board. However, if someone had been assigned the responsibility—if there had been a Quarterback—it may have helped keep the team in line. At least some of the players may not have been as bold and cavalier.

The Sarbanes-Oxley Act, requiring internal controls and audits, will help preempt similar Enron-like debacles from occurring; but it will not safeguard against the conflicts of interests and issues of self-dealing that were involved in Enron<sup>35</sup>—and that are involved in MDPs (as noted above and

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31. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (2003).

32. See Powers, Report of Investigation, *supra* note 16, at 10 (finding that “[n]o one in Management accepted primary responsibility for oversight”).

33. *Id.* at 9-10.

34. *Id.*

35. *Id.* at 18-19.

below). Likewise, having an MDP Quarterback is not foolproof but it is more than just another procedural control. An MDP Quarterback is an active, live measure to safeguard against inefficiency and risks, to ensure controls are structurally sound and executed properly, and to "prevent the abuses that [flow] from . . . inherent conflicts of interests."<sup>36</sup> Moreover, it may help preempt an SEC regulation of lawyers akin to the Sarbanes-Oxley Act (something most lawyers do not want to have happen) if MDPs are formed.<sup>37</sup>

## II. GENERAL COUNSEL ARE UNIQUELY POSITIONED TO BE THE MDP QUARTERBACK

Any competent, senior business leader could probably be the MDP Quarterback but a General Counsel should be the Quarterback because research suggests a General Counsel is better suited. My research shows General Counsel are uniquely positioned to be the Quarterback for their client's use of service providers, regardless of whether the MDP is hired to provide traditional legal services or other services like financial consulting or advertising. There are five major reasons why General Counsel are well-suited (and in many instances better-suited) to be their companies' MDP Quarterback.

### A. General Counsel Are Talented, Smart, Strategic, Senior Executives with General Business Experience Managing Projects and People

Because this job is multi-disciplinary and cross-functional by nature, the senior executive that fills this role needs to be well respected, influential, adept at managing people, a strategic

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36. *Id.*

37. The ABA feels that "regulation of lawyers should remain the province of the judiciary, not the executive, and any attempt to grant the accounting oversight board or the SEC the power to adopt a set of national rules would violate separation of powers principles." Villa, *supra* note 5, at 6. Unfortunately, some view the Enron crisis as providing "evidence of the contemporary failure of the ideal of independent professions as self-regulating groups capable of accepting an obligation to constrain as well as facilitate the desires of their clients." *Id.* at 4 n.6.



thinker, and an expert in the company's business. The two arguments company personnel might make against the General Counsel taking on the MDP Quarterback role is that: 1) General Counsel are second class attorneys; and 2) General Counsel think like attorneys first and business executives second, and therefore, don't meet the criteria needed for the job. Neither of these statements, however, is true today.

### 1. General Counsel Are First-Class Attorneys

The role of General Counsel has changed dramatically over the past 30 years. When attorneys were first hired in-house, they did not play a major role<sup>38</sup> in the company's business and there was a stigma attached to being an in-house attorney.<sup>39</sup> Being an in-house attorney meant either you could not cut it as a partner or you were just whittling away time before you retired.<sup>40</sup> In the 1970s, however, with the rising costs of legal services, business executives realized major efficiencies by bringing more legal

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38. See Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 277; Samuelson, *supra* note 7, at 336 (noting that "until about 1970, in-house counsel were, by and large, minor players, offering little competition to law firms when it came to handling major corporate legal problems.").

39. See Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1011-12 (1997).

The term 'house counsel' was one of double disparagement. The term implied a lawyer who labored under a client's thumb, unable to exercise the 'independent professional judgment' that was a defining characteristic of 'real' lawyers. The term also implied a practitioner who lacked some of the qualifications necessary to practice law and thus sought refuge in employment in a corporate law department.

*Id.*; General Counsel Interviews, *supra* note 9.

40. Dianne Molvig, *An Inside View of Corporate Counsel*, 70 WISC. LAW. 14, 14 (1997) (noting that "in the past, in-house lawyer positions were thought best suited to two groups of attorneys. Those nearing retirement... and other lawyers who had failed to progress along the partnership track in private law firms."); Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985) (pointing out that "the traditional house counsel was a relatively minor management figure, stereotypically, a lawyer from the corporation's principal outside law firm, who had not quite made the grade as partner.").

work in-house.<sup>41</sup> In the 1980s, the negative perception of in-house attorneys began to wane as more complex and non-routine work was brought in-house<sup>42</sup> and company executives sought out high quality skilled lawyers from reputable law firms to work in house.<sup>43</sup> As the complexity of issues brought in-house and government regulation increased, the need developed for a General Counsel that was "well-versed in all of the client's business operations and therefore equipped to advise clients on a daily basis with respect to compliance issues" and able to perform a "preventative maintenance legal function" efficiently.<sup>44</sup> Rising to the challenge, these new General Counsel leveraged their skills and training and began to "add value through specialized knowledge of the business."<sup>45</sup>

Today, we have a "new breed of General Counsel [that] has left [the] stereotype far behind . . . the General Counsel sits close to the top of the corporate hierarchy as a member of senior

41. See Samuelson, *supra* note 7, at 336 (explaining that "over the last twenty years, however, spurred by evidence that legal work can often be handled inside at less than two-thirds the cost of outside firms, corporations have brought more and more of their work in-house."). Consequently, corporations increased the size of the legal departments and "redirect[ed] delivery of routine predictable services such as consumer credit and commercial loan transactions from outside counsel to salaried lawyers in-house." Daly, *The Role of the General Counsel*, *supra* note 7, at 1060. At first, the work in-house counsel handled was very routine. See Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 499 (1998); Daly, *The Role of the General Counsel*, *supra* note 7, at 1060.

42. See Molvig, *supra* note 40, at 15; Moore, *supra* note 41, at 499.

43. See Molvig, *supra* note 40, at 15; Daly, *The Role of the General Counsel*, *supra* note 7, at 1060; Daniel J. DiLucchio, Jr., *The New Millennium Law Department: A Paradigm for the 21<sup>st</sup> Century*, available at [http://altmanweil.com/publications/articles/management/body\\_mgt1.htm](http://altmanweil.com/publications/articles/management/body_mgt1.htm) (on file with author).

44. Daly, *The Role of the General Counsel*, *supra* note 7, at 1061; see also DiLucchio, *supra* note 43 (noting that in-house lawyers "spoke the corporate language, relieved business executives of the time and effort of dealing with legal issues, and provided general counseling and educational/ preventative programs.").

45. Daly, *The Role of the General Counsel*, *supra* note 7, at 1060-61; see also DiLucchio, *supra* note 43.

management" in most companies.<sup>46</sup> Today, General Counsel represent some of the most qualified, experienced, and well-respected attorneys in the legal profession.<sup>47</sup> Of the fourteen General Counsel interviewed, six previously had been partners in law firms and all but one had at least fifteen years of experience. Moreover, these General Counsel manage departments replete with other highly-experienced legal professionals. At Union Bank of California, for example, the average experience of the twenty-four attorneys in the department is that of a senior partner. The most junior attorney is thirteen years out of law school. One of the interviewees, the General Counsel of a large pharmaceutical

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46. Chayes & Chayes, *supra* note 40, at 277; General Counsel Interviews, *supra* note 9; Hazard, *supra* note 39, at 1011; Linda Campillo, *A Lawyer in the House: In-House Counsel Find Many Professional, and Personal, Rewards*, 58 OR. ST. BAR BULL. 17, 21 (1997) (noting that attorneys in the Pacific Northwest believe that the image of corporate counsel as being "second rate" or something that impedes the in-house career choice is no longer true). *But see* Molvig, *supra* note 40, at 18 ("To some extent a corporate lawyer is still seen as a second-class attorney . . . not only because we're perceived as not practicing 'real' law, but also because we represent a corporation rather than individuals.") (quoting an in-house attorney).

Although it appeared through most of the author's secondary research and her interviews that the negative stigma is gone, one General Counsel interviewee and the CFO interviewee felt that the stigma lingered. AnonymousJ remarked:

When I became an in-house attorney it was a clear abandonment of the appropriate top career choice—loser's role—that's how it was described to me . . . Today, it has changed but not dramatically. To a very large extent, the best lawyers are in the big law firms . . . General Counsel are generalists. I do a little of everything and none of it totally well . . . General Counsel are runts of the litter.

Interview with AnonymousJ, *supra* note 9. Ms. DeStefano expressed similar views when asked about her impression of General Counsel: "I tend to think [that] [General Counsel] is either an associate who couldn't make partner or an attorney who wants to be involved with only one business and serve only one client." These remarks may be anomalies stemming from the interviewees' unique experiences, or the case may be, as AnonymousJ suggests, that the "higher end General Counsel" are respected and envied but the middle of the road General Counsel may not be. Telephone Interview with DeStefano, *supra* note 11.

47. See Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 3 (noting that "the average number of years in practice of an in-house lawyer is close to twenty"); General Counsel Interviews, *supra* note 9.

company, has eight senior lawyers reporting to him that are "the equivalent to a General Counsel somewhere else."<sup>48</sup> Ultimately, what started as a game of efficiency turned into one of quality.

Not only has the negative stigma disappeared,<sup>49</sup> but today the pendulum has swung in the other direction. General Counsel are viewed as top quality professionals, and between outside and inside counsel, they are recognized as the ones with the power.<sup>50</sup> Susan S. Samuelson summed it up nicely in her review of Sally Gunz's Book, *New Topics for Research in Legal Studies: The Role of Corporate Counsel*:

Familiarity has bred respect . . . executives have found that corporate counsel often provide better service than outside law firms. Indeed corporate counsel who, not so long ago, were dismissed as second-raters, fit only to perform routine legal chores, are now hailed as creative strategists with a keener, purer appreciation of the clients [sic] needs. In-house counsel have not only taken on a larger role in solving their company's legal problems but, perhaps even more importantly, they often control the allocation of the legal work . . . In short, [they] have changed the power structure in the legal industry.<sup>51</sup>

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48. Telephone Interview with AnonymousF, *supra* note 9.

49. *Id.*

50. See Daly, *The Role of the General Counsel*, *supra* note 7, at 1059-60 (pointing out that there has been a "shift in power from outside law firms to the offices of General Counsel" as their "responsibilities expanded" and high quality professionals sought employment in-house). *But see* Morris W. Hirsch, *The Pendulum Swings Back: General Dynamics and Other Signs of Changing Fortunes of In-House Counsel*, 3 NEV. LAW. 13, 13 (1995) (noting that that the "pendulum is swinging back, . . . and the position of in-house counsel is beginning to erode" due to "the unusual pressure on General Counsel and two cases that paint ugly pictures of in-house counsel," but emphasizing that his experience has not been negative and judges rely on outmoded stereotypes of the nature of in-house practice). However, most of the secondary research and almost all of the author's interviewees supported the opposite proposition. See *supra*, text accompanying notes 46-47.

51. See Samuelson, *supra* note 7, at 337. Despite their increase in stature and power, the absolute number of in-house attorneys has not increased relative to the total number of practitioners over the years. Since the ABA started to keep track, in-house lawyers have made up approximately 10% of the bar. In

It is the General Counsel, not the law firm partners, who are now the "statesmen to chief executive officers (CEOs), confidently offering business as well as legal advice."<sup>52</sup>

2. General Counsel Are Not Just Top-Notch Attorneys, They Are Top-Notch Senior Executives

Most General Counsel have a broad range of responsibilities and perform a mixture of legal and non-legal work.<sup>53</sup> General Counsel are highly influential senior executives who manage and mentor people, provide strategic business counseling, and participate in long-term decisions for the company.

Like any other senior executive, General Counsel spend a great deal of time managing people. Most General Counsel manage the other attorneys in their in-house legal department and, many times, they manage other departments that report to them. A majority of General Counsel interviewed have both lawyers and non-lawyers reporting directly to them,<sup>54</sup> and many have other departments such as customer service, sales, marketing, human resources, purchasing, engineering, health/safety, and accounting reporting to them.<sup>55</sup>

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keeping with that, in-house law departments have not grown dramatically in size. Over 50% of the Fortune 500 companies have law departments that are smaller than ten lawyers, and the average in-house department of the attorneys registered with ACCA has fewer than three attorneys. See Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 2; Telephone Interview with AnonymousH, *supra* note 9.

52. Daly, *The Role of the General Counsel*, *supra* note 7, at 1064 (explaining that this shift in power from the large private law firms to General Counsel is "fundamental and irreversible").

53. The following discussion about legal and non-legal work performed by lawyers must be prefaced with the comment that very little in business is strictly business without having a legal component and very little in legal work is strictly legal without also including other aspects of business. See Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 5.

54. General Counsel Interviews, *supra* note 9.

55. For example, AnonymousJJ, President and Chief Legal Officer of an Internet communications company, supervised the VP for customer service and thereby the customer support employees. AnonymousT supervises sales, marketing, and accounting employees in various matters. The accounting, tax

Being a General Counsel is a "big change" from being an outside attorney because "it is a management job as opposed to a practice job."<sup>56</sup> One General Counsel (a former partner at large law firm) pointed out, "lawyers are very singular, contributory, people and generally not great managers," but General Counsel are a different breed of lawyers. To do the job competently, General Counsel must be adept at managing people. One General Counsel noted that her job was "figuring out what people do best, getting [her people] the tools to get them to do well, and not being afraid to face personnel issues."<sup>57</sup> Just as success as a General Counsel depends on people-management skills, success as the MDP Quarterback is similarly dependent because this person will oversee many groups of people from different disciplines and different companies.

Most General Counsel have a large sphere of influence in the companies for which they work and are part of the senior management team that makes the long-term strategic decisions for the company. General Counsel are part of the lead team and "come to the table to build business solutions."<sup>58</sup> Of the fourteen General Counsel interviewed, ten are part of the senior management team or consider themselves a major player in the long-term strategic decisions for the company. Of the four that did not consider themselves essential members of the senior

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and human resources departments report to AnonymousR, Executive Vice President and General Counsel of a large financial corporation in CA. AnonymousO, although he has spent most of his time concentrating on M&A work this year, has had the Purchasing, Facility & Engineering, Health & Safety, and Shipping & Receiving departments reporting to him in the past. After his company's upcoming merger, he will be responsible for integrating all three companies from an operations perspective (versus a legal one).

56. Telephone Interview with AnonymousK, *supra* note 9.

57. Telephone Interview with AnonymousE, *supra* note 10 (stating that, in addition, people skills are crucial to the job as General Counsel).

58. Molvig, *supra* note 40, at 17; *see also* Chayes & Chayes, *supra* note 40, at 282 (stating that "in all but one of the cases studied, the General Counsel is a member of the senior management council or committee at which final decisions are made"); Samuelson, *supra* note 7, at 341 (noting that although not all lawyers agree, she agrees with Professor Gunz's opinion that an in-house lawyer is "an integral part of the executive structure" and "not just a lawyer who happens to work for one client" but a "member of the managerial team").

strategy team, three of them chose not to be a part of the team. One claimed he was “influential and deeply involved in the strategic planning process” despite not being a board member.<sup>59</sup> Another said he was not on the team “by choice” because he believes attorneys should not be board members as a general rule. Nonetheless, he has “been majorly involved in the business side of things, not just legal.”<sup>60</sup> Another said his role is more “narrow and tightly defined” and that is how he likes it.<sup>61</sup>

When participating in the strategic decisions of the company, General Counsel provide more than just legal advice. This makes sense because, like other senior executives, General Counsel hold additional titles such as Corporate Secretary, VP of administration, VP of Human Resources, VP of Compliance, and VP of Privacy.<sup>62</sup> General Counsel are not just the client’s lawyer but “part of the client.”<sup>63</sup> They are senior business advisors in all areas of their client’s business. Small or large, clients “expect their General Counsel to be involved in any big strategic issues at the heart of the organization and to know very intimately what’s going on in the minds of top executives.”<sup>64</sup> All of the General

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59. Telephone Interview with AnonymousMc, *supra* note 9. Three interviewees did not feel they were part of the senior strategy team: AnonymousMc, AnonymousO, and AnonymousJ. The response from AnonymousY was unclear; therefore, the author has assumed she was not part of the team.

60. Telephone Interview with AnonymousO, *supra* note 9.

61. Telephone Interview with AnonymousJ, *supra* note 9.

62. Telephone Interview with AnonymousH, *supra* note 9. Although only one of the respondents in this study held a title that specified another department, twelve were senior officers of some sort (either EVP, SVP, VP or President) of their companies and seven were Corporate Secretaries or the attorneys that were Corporate Secretaries reported to them.

63. Hackett, *The Future of In-House Law Dep’ts*, *supra* note 15, at 2; *see also* Daly, *The Role of the General Counsel*, *supra* note 7, at 1072 (noting that General Counsel are “part of the strategic business team on a particular project from the outset” and input is expected on not only the “legal aspects” but also “the strategic implications for the company as a whole”); Timothy P. Terrell, *Professionalism As Trust: The Unique Internal Legal Role of the Corporate General Counsel*, 46 EMORY L.J. 1005, 1006-07 (1997).

64. Importantly, a General Counsel’s sphere of influence does not seem to be tied to the size of company or legal department. The four General Counsel that did not consider themselves part of the senior strategic team and thus

Counsel interviewed were adamant that the teams of which they were a part were open to hearing their opinions on non-legal aspects of all kinds of business projects, such as development of new products, marketing, hiring, internal restructuring.<sup>65</sup> General Counsel bring a respected but different vantage point to the table and "there is a healthy respect for the more generalized talents and analytical ability and judgment of the lawyer outside of the law."<sup>66</sup> One General Counsel explained he is one of five people on the executive committee who provides input on all major decisions for the company.

The CEO, CFO, CPO, COO and the General Counsel all bring their own view of the world to the table and participate in major decisions. My way of analyzing a business issue comes from my legal training in school and previous work [at a large law firm]. I see things differently than the sales or finance guy, so we all add something.<sup>67</sup>

Even the attorneys who do not sit on the senior management team provide non-legal input. One of the four interviewees who does not sit on the senior management team said he spends at least 50% of his time giving business advice. He jokingly referred to himself as a "*consigliere*" – working "not on traditional legal work or legal analysis but more in a business role."<sup>68</sup>

Not only do General Counsel have non-legal responsibilities, but they are often business people first and lawyers second. Some serve primarily as "business advisors, negotiators, investigators, accountants, messengers, corporate directors . . . corporate officers," founders of companies, mediators, trouble-

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perhaps had a lesser sphere of influence came from large, medium, and small companies with large and small legal departments; Daly, *The Role of the General Counsel*, *supra* note 7, at 1061.

65. The only half-exception to this comment is the interview with AnonymousJ. He works for a U.S. subsidiary of nine Japanese trading companies. He said that his role is a "bit less strategic than a well placed General Counsel at an American company." His focus is law. He came to the company to argue cases and a large part of what he does is ADR/mediation.

66. Telephone Interview with AnonymousL, *supra* note 9.

67. Telephone Interview with AnonymousD, *supra* note 9.

68. Telephone Interview with AnonymousMc, *supra* note 9.



shooters, and strategists.<sup>69</sup> For example, one General Counsel interviewed acts as the company's internal mediator.<sup>70</sup> When different groups in the company are disputing, he is brought in to use classic mediation strategies to help resolve the situation. Additionally, he has spent a lot of his time troubleshooting and doing what a finance person and/or an accountant might do. When his company decided to invest in an operation in Europe, he was "deeply involved in setting up offices, employment arrangements, and infrastructure problems" and was in charge of "get[ting] to the bottom of where something [was] out of whack" with "royalties" and "operations." A General Counsel interviewee from a large, global pharmaceutical company spends a majority of his time running the public affairs department and making strategic policy decisions.

Another General Counsel interviewee acts as the protocol-cultural officer of the bank for which he works.<sup>71</sup> His company, although publicly traded in the United States, is a Japanese company with the majority of shareholders from Japan. Part of his job is to help bridge the east and west culturally when the Americans meet up with the Japanese people. Therefore, he arranges dinners, photographs, and social gatherings, and he "choreographs transitions at the director level." In describing his job, he exclaimed "a lot of it is social and a lot of it is very political—the thread that runs through most of my work is political and diplomatic—and my career can be as threatened by picking the wrong wine as by giving the wrong legal advice."

General Counsel are business executives that have been trained in analytical thinking by attending law school and formerly performing legal work,<sup>72</sup> but they are not specialists. While they may have practiced one type of law in their former careers, General Counsel now serve as generalists. As the General Counsel of a large pharmaceutical company explained, a

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69. Amy L. Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO. J. LEGAL ETHICS 393, 393 n.4 (1998); General Counsel Interviews, *supra* note 9.

70. Telephone Interview with AnonymousT, *supra* note 9.

71. Telephone Interview with AnonymousMc, *supra* note 9.

72. Most of the General Counsel interviewees previously worked at large law firms (versus small firms).

General Counsel's job is to "understand the goals of the business and how to bring in the kinds of services clients need to meet their objectives."<sup>73</sup> The Vice President and General Counsel of Reebok International, Ltd., stated in his on-line article *Reebok Rules* that "[his] job at Reebok is as a general practitioner responsible for the overall legal and business health of the client."<sup>74</sup> He analogized the role of the General Counsel to that of a "medical doctor who acts as the general practitioner responsible for his or her patient's health."<sup>75</sup>

To that end, the one thing General Counsel do "specialize" in is their client's business.<sup>76</sup> Every General Counsel interviewed mentioned this specifically. Therefore, like other senior managers, General Counsel attend sales meetings and trade shows, read trade magazines, research the industry and the company's files and history, and participate on multidisciplinary teams. Moreover, General Counsel proactively compensate for the fact that their training is different from other senior executives. For example, many General Counsel take educational courses in finance, participate in programs offered by ACCA, and meet with other General Counsel to share learnings.<sup>77</sup> This in-depth knowledge is an important asset to their clients<sup>78</sup> and crucial for the MDP Quarterback. Neither outside counsel nor the consultants from the PSF/MDP will have this type of understanding. Unlike outside counsel and outside service firm managers, General Counsel are not a "half step removed from complete understanding of the business."<sup>79</sup> General Counsel have a good "feel for where the business is, where it's going, why it's going there, who the people are, what the appetite for risk is

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73. Telephone Interview with AnonymousF, *supra* note 9.

74. John B. ("Jack") Douglas, *Reebok Rules*, at <http://www.acca.com/protected/pubs/docket/Spring92/reebok.html> (on file with author).

75. *Id.*

76. General Counsel Interviews, *supra* note 9.

77. E.g., Telephone Interviews with AnonymousB and AnonymousH, *supra* note 9; Douglas, *supra* note 74.

78. See *id.*; Telephone Interviews with AnonymousB, AnonymousF, AnonymousJ, and AnonymousO, *supra* note 9.

79. Molvig, *supra* note 40, at 16 (quoting a corporate counsel).

and what the corporate culture is.”<sup>80</sup> Such understanding makes General Counsel adept at their job, confident in making legal and business recommendations, and more valuable to the company.<sup>81</sup> As one General Counsel explained, the General Counsel needs to understand what is going on in the business and the industry so that when the client approaches the General Counsel with a legal problem, the General Counsel “can put it in an overall business context.”<sup>82</sup> If this were not the case, the client could “just go to the law firms whenever they have a question for legal expertise.”<sup>83</sup>

In sum, General Counsel are competent and the kind of business executives people want on their team. General Counsel can:

Broaden the MDP teams because they are very good at problem-solving and good at dealing in white space with no boundaries. They are good at figuring out solutions and dealing with practicalities within the company and working with third parties to get it done. Project Management and solutions—[General Counsel] are the place you come when things are going wrong and you need some help.<sup>84</sup>

### B. General Counsel Have Experience Hiring and Managing PSF Consultants

Like other senior executives, General Counsel have experience managing make-buy decisions and overseeing

80. *Id.*

81. See Douglas, *supra* note 74, at 4; Telephone Interview with AnonymousB, *supra* note 9:

The best General Counsel and in-house lawyers are those who place a premium on knowing their clients business. You have to understand your business . . . understand the industry, the competitive marketplace and emerging technologies and how all of this plays into company business strategies. You have to do this to continue to be relevant and prove yourself everyday to the business.

*Id.*

82. Telephone Interview with AnonymousO, *supra* note 9.

83. *Id.*

84. Telephone Interview with AnonymousR, *supra* note 9.

"beauty contests" for service firms.<sup>85</sup> In fact, all the General Counsel interviewees are in charge of the make-buy and the law firm selection process.<sup>86</sup> They act as purchasing agents for outside counsel in deciding what should be outsourced and to whom.<sup>87</sup> Once a law firm is hired, General Counsel must manage and review the legal services provided for quality, cost, and value.<sup>88</sup> Importantly, more than half of the General Counsel interviewees have been or are currently involved in the PSF selection process for non-legal services.<sup>89</sup> Being the MDP Quarterback does not mean the General Counsel is the essential buyer when the project is not focused on the law, but the General Counsel's experience with evaluating, managing, and hiring outside service partners (e.g., law firms) will prove invaluable to the role of MDP Quarterback.

C. General Counsel Are Lawyers and Therefore Neutral, Risk-  
Managers

A more obvious reason why General Counsel should be the MDP Quarterback as opposed to any other senior executive (like the CFO or CEO) is that General Counsel are lawyers. Being an attorney within the internal legal department provides four substantial advantages.

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85. AnonymousT was the only interviewee that does not outsource any law work (but he has in the past.) AnonymousH did not answer question. All General Counsel (including AnonymousH and AnonymousT) stated that the decision on whom to hire and what to outsource is their decision.

86. General Counsel Interviews, *supra* note 9.

87. *Id.*; see also Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 2-4.

88. General Counsel Interviews, *supra* note 9; see also Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 2-3.

89. While they are not making the decision on whom to hire when the service is not law, they do have input and influence. Telephone Interviews with AnonymousH, AnonymousK, AnonymousJJ, AnonymousF, AnonymousMc, AnonymousR, and AnonymousL, *supra* note 9.

1. General Counsel Are More Likely To Be in a Neutral Position on the Taskforce

General Counsel are more likely to be neutral because a PSF project is less likely to have law as its main focus versus some other business subject like marketing, technology or product development. Therefore, the General Counsel may be better able to remain objective, unlike a senior manager whose business unit will be more directly affected by the project. While the General Counsel is part of the team like any other senior manager, the General Counsel's real client is the company as an entity. Therefore, he/she focuses on the overarching objectives and not simply on the projects and goals of a certain department.<sup>90</sup> While they are on the inside (an internal employee as opposed to counsel at a law firm), General Counsel are also somewhat on the outside (separated off from the other employees by the nature of the job). This one-step removal may lessen the type of team pressure that leads to risky decisions.<sup>91</sup> This more holistic and global understanding will help General Counsel leverage work across different departments and guard against missed risks and opportunities.

2. General Counsel Can Identify the Less Obvious Legal Issues

Being trained in the law is the second and probably the most obvious reason (and perhaps the most important reason) why General Counsel should wear the MDP Quarterback helmet as opposed to other senior managers. A CFO or CEO would likely

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90. This supports why the CFO or other department head is not the ideal MDP Quarterback.

91. See Campillo, *supra* note 46, at 22 ("Being on the inside sometimes makes it harder to see and be objective on a management team due to team pressures.") (statement of a corporate counsel). This comment was made in reference to outside attorneys. The in-house attorney said that sometimes, outside attorneys are more objective than inside attorneys given "team pressures." However, the fact that in-house attorneys recognize this and have to negotiate this hurdle daily makes them better able to look for and recognize it than perhaps a different senior manager. Moreover, the fact that it is hard for people on the team to be objective supports that an MDP Quarterback would be valuable for companies using PSF clients. See discussion, *supra* Part I.B.

"miss some things about accountability for law, [the] tough legal issues."<sup>92</sup> There are three reasons why this is true: (1) there is hardly anything in business that the law does not impact in some way<sup>93</sup>; (2) the lines are blurry as to what is "law"<sup>94</sup>; and (3) MDPs have a very "opaque way of proceeding" often offering solutions with legal ramifications that are not transparent. The General Counsel can help protect the client by serving in this new role.<sup>95</sup>

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92. Roster, *ACCA Remarks*, *supra* note 3, at 5 (quoting Mr. William Ide III, former President of the American Bar Association, Senior Vice president, General Counsel, and Secretary of Monsanto Company).

93. See Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 5 ("There's very little . . . that is a business function without a legal impact: the client's legal protection is imbedded in most all company projects."); Chayes & Chayes, *supra* note 40, at 281:

Even transactions that are not legally intensive or of major significance are likely to involve inside counsel in early planning [because] . . . corporations are probably in a far better position to accomplish business goals in a legally optimized matter with effective inside counsel than without, even though [an] outside law firm may have greater expertise and experience.

*Id.*

94. See, e.g., Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 281 (noting that "the boundaries between the law and other disciplines are blurring."); Matheson & Favorite, *supra* note 2, at 581-82 ("Legal distinctions between the professions have blurred . . . the definitions and interpretations of 'legal services' and 'unauthorized practice of law' are . . . critical.").

95. Wall Testimony, *supra* note 8 (commenting that MDPs opaque way of proceeding may lessen their appeal and that the services need to be clarified so that the company knows what they are paying for and how to protect against risks). Ms. Wall explained that companies "[r]ather than analyze what's happening . . . may accept what is called the 'Trojan Horse' offering (there's legal advice the corporation doesn't know about in there)." *Id.* Corporations need to know at the start if "law has been an input into the solution offered." *Id.*; see also Oral Testimony of Professor Laurel S. Terry, Penn State Dickinson School of Law, Before the Multidisciplinary Practice Commission [hereinafter Terry Testimony] (discussing the importance of agreements being more transparent), available at <http://www.abanet.org/cpr/terry.html> (last visited Sept. 1, 2003); Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 281 (noting that "the boundaries between the law and other disciplines are blurring").

It is important to point out that the research supports General Counsel filling this role even when the MDP a company uses provides law as a secondary or tertiary service. This is because the complexities involved with lawyers partnering with non-lawyers exist regardless of how central law is to the MDP's function and because it is hard to tell when law has been input into a

The General Counsel's legal experience enables the General Counsel to ensure that service agreements are clear, detailed, and enforceable.<sup>96</sup> The General Counsel can ensure that the types of services being offered (legal or non-legal) are made more transparent up front. This enables the client to make an "educated choice" among service providers.<sup>97</sup>

The General Counsel can also help guard against the unauthorized practice of law during the project.<sup>98</sup> Lawyers (as opposed to non-lawyers) understand and are bound by the legal profession's standards of ethical conduct. Therefore, lawyers can ensure compliance better than non-lawyers can. The General

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solution. Moreover, even if one could be sure that law does not affect a certain project, the findings support that the General Counsel is as qualified (if not more) from a business professional standpoint to take on the MDP Quarterback role. See discussion, *supra* Part II.C.1-2 and *infra* Part II.C.3-4. Moreover, it would not make sense for a company to switch the MDP Quarterback based on the type of service that is being provided since that will invariably change as providers change and the company's needs change. The key is to have someone on board at all times who sees the whole puzzle and therefore, can protect against inefficiencies, risks, and overlap. A General Counsel sees the whole puzzle and has a law degree, unlike most CEOs, CFOs or CMOs (who may have MBAs, CPAs or CFAs). See discussion, *infra* Part II.C.3 about General Counsel as risk manager; see discussion, *supra* Part II.C.1 about who General Counsel's client is.

96. See Wall Testimony, *supra* note 8; Roster, ACCA Remarks, *supra* note 3, at 18 ("One of the huge challenges . . . is explaining to the client what the legal issues and true legal risks are and what role the lawyers have. We're talking about a process in which the client is educated and able to make a business decision.") (statement of Mr. William Ide III, former President of the American Bar Association, Senior Vice president, General Counsel, and Secretary of Monsanto Company).

97. Wall Testimony, *supra* note 8.

98. See Matheson & Favorite, *supra* note 2, at 606 (discussing why lawyers should be the independent directors overseeing MDPs and highlighting that the fear of unauthorized practice of law in MDPs is unfounded because lawyers will continue to be bound by the ethical rules of the legal profession). The author believes it is an asset to have an attorney assigned to watch out for the unauthorized practice of law, to aid the MDP's attorneys with compliance since (as mentioned earlier) the lines between what is law and what is not are blurry. Matheson & Favorite, too, recommends that a lawyer oversee the lawyers at the MDP to ensure compliance with the ethical rules including the rules on the unauthorized practice of law. *Id.* at 614-15.

Counsel (because he/she is a lawyer) can recognize when the supervising lawyers at the MDP are or are not fulfilling their ethical duties as they relate to employment relationships with non-lawyers. They also can "ensure that the lawyers acting in the consulting business are not practicing law as part of that business."<sup>99</sup> Moreover, the General Counsel can make sure that the non-lawyer employees are not providing legal advice to the client or doing other things that may be interpreted as the practice of law. While it may seem odd to have the General Counsel (who is a lawyer) keeping watch over other lawyers, this idea is in keeping with the legal profession's ideal of self-regulation.<sup>100</sup> Lawyers safeguard the reputation of the legal profession by ensuring that other lawyers follow the rules that lawyers have made for themselves. By watching over their own, lawyers escape the need for external regulation to prevent corruption, and they protect the independence that the profession so needs in order to deliver ethical and valuable service to their clients.<sup>101</sup>

3. General Counsel Have Experience As, and Are in the Best Position To Be, Risk Managers

General Counsel already serve as risk managers for their companies.<sup>102</sup> As an MDP Quarterback, General Counsel will be

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99. *Id.* at 614.

100. See Villa, *supra* note 5, at 4 n.6 (noting that some view the Enron debacle as failure of the "ideal of independent professions as self-regulating groups").

101. See Matheson & Favorite, *supra* note 2, at 611 (using this same reasoning to recommend that the independent directors that oversee MDPs be lawyers versus non-lawyers).

102. See Daly, *The Role of the General Counsel*, *supra* note 7, at 1070 (describing that legal risk analysis "blends both legal and business advice by drawing upon the corporation's conception of itself embedded in its cultures and policies" and that it "enables [General Counsel] to become influential within the corporation"); see also Telephone Interview with AnonymousY, *supra* note 9 (saying she was on the risk assessment team which primarily provides legal advice but sometimes strategic business advice); Stephen J. Friedman & C. Evan Stewart, *The Corporate Executive's Guide to the Role of the General Counsel*, at 1 (explaining that the General Counsel's role as risk manager "is not strictly a



able to recognize risks earlier as opposed to later and this increases efficiency. Given "the growing complexity of modern corporations and the explosive growth of costs associated with regulation and litigation, the General Counsel's most important role is really that of manager of a major set of risks faced by American Corporations."<sup>103</sup> This is an especially crucial part of the General Counsel's job because:

The level of risk the company is assuming is often undertaken without a conscious decision having been made . . . While the managers involved in each project may have made a careful judgment about what they believe to be the legal risk involved, in fact the scope of that risk, its wider consequences for the company, the relationship between that risk and others, and the aggregate risk being assumed by the company often are matters that only the General Counsel is in a position to assess in their entirety.<sup>104</sup>

It is the General Counsel's job to appraise the other Senior Managers of the situation and as one General Counsel pointed out to "encourage [them] to think of risk in terms other than money."<sup>105</sup>

General Counsel have "a separate information flow from all parts of the company, permitting [them] to look at the accumulation of business risks assumed by the company."<sup>106</sup> Adding this new role of MDP Quarterback to their list of responsibilities simply adds to the information flow. Thus, General Counsel are better able to do what is already part of their job. On the flip side, one could argue if General Counsel do not take on this role then they will not be able to do the job of risk manager as effectively as they should. This is because General

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legal one; it encompasses financial, moral, and public relations issues, as well"), available at

<http://www.acca.com/protected/pubs/docket/mjoo/gcguide.html> (on file with author).

103. Friedman & Stewart, *supra* note 102, at 1.

104. *Id.* at 2.

105. Telephone Interview with AnonymousH, *supra* note 9. See also Friedman & Stewart, *supra* note 102, at 3 (noting that a part of risk management is "managing the corporation's legal costs").

106. Friedman & Stewart, *supra* note 102, at 2.

Counsel will not be aware of potential legal risks associated with MDP projects in which they are not involved. The people working on the project cannot be counted on to bring the legal risks to the General Counsel's attention because the legal consequences may not be readily apparent to the people working on the project.<sup>107</sup> Moreover, working with the MDP may provide a false sense of security that the legal risks are being covered (by the MDP lawyers) when in fact they are not.<sup>108</sup> Hence, the General Counsel will no longer be in the position to "assess [the company's risks] in their entirety."<sup>109</sup>

More importantly, with the General Counsel in this role, a lawyer is "asking the hard questions, the unpopular questions" that the CEO or CFO could easily miss.<sup>110</sup> The client makes

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107. See Roster, ACCA Remarks, *supra* note 3, at 5. Mr. William Ide III, former President of the American Bar Association, Senior Vice president, General Counsel, and Secretary of Monsanto Company talked about how "accountability for the law" and "tough legal issues" are missed when the General Counsel is not involved: "I've seen deals handled at corporations on the CFO side, where there isn't sufficient worry about the legal issues. The deals go through but two years later, oops, things didn't quite get handled legally the way they should have been." *Id.* See also Wall Testimony, *supra* note 8 (commenting that MDPs' opaque way of proceeding may lessen their appeal and that the services need to be clarified so that the company knows what they are paying for and how to protect against risks.). Ms. Wall explained that companies "[r]ather than analyze what's happening . . . may accept what is called the 'Trojan Horse' offering (there's legal advice the corporation doesn't know about in there)." *Id.*

108. At ACCA's 1999 Annual Meeting in San Diego, an audience member who was a General Counsel for twelve years made a similar argument regarding the future role of General Counsel and in-house law departments if MDPs are introduced. He said that when a lawyer did not report to him but "reported to someone else, for instance, an outside multidisciplinary team . . . the CFO would gloss over some very important issues. When [he] brought them up, the answer was 'We have a lawyer. We're taking care of it.' But they weren't. They weren't asking the hard questions." He said he thought this was "dangerous." Roster, ACCA Remarks, *supra* note 3, at 17-18.

109. Friedman & Stewart, *supra* note 102, at 2.

110. Roster, ACCA Remarks, *supra* note 3, at 5 (quoting Mr. William Ide III, former President of the American Bar Association, Senior Vice president, General Counsel, and Secretary of Monsanto Company).

decisions knowing what the legal risks are,<sup>111</sup> and the client “get[s] the legal advice it really need[s]” when it needs it—*i.e.*, before a breach is made.<sup>112</sup> The timing is key because it is about prevention, protection, and efficiency. As M. Elizabeth Wall, Group Director of Legal and Regulatory Affairs at Cable & Wireless, stated before the Multidisciplinary Practice Commission, “an in-house lawyer’s challenge is to get involved in the transaction soon enough so that the best and most efficient legal advice can be used.” When the General Counsel is brought in later, some risks may already have been assumed, and inefficiencies will have resulted.<sup>113</sup>

#### 4. General Counsel Bring a Higher Ethics Conscience to the Team

Although General Counsel serve on the board like any other senior executive, the “position of General Counsel carries with it an inherently higher set of lawyering values . . . . [General Counsel] bring . . . their own brand of professionalism.”<sup>114</sup> This different brand of professionalism stems from the dual role General Counsel play in the company as a senior manager of the business and as a senior legal advisor—“rendering legal advice to himself.”<sup>115</sup> To that end, General Counsel view themselves as the

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111. See Roster, ACCA Remarks, *supra* note 3, at 18 (statement of former President of the American Bar Association, Senior Vice president, General Counsel, and Secretary of Monsanto Company) (“My biggest concern is that the risk-reward scenario has a lot of legal judgment in it. If you don’t have a lawyer in there independently asking the hard questions, then clients will make decisions without knowing what the risks were. I’ve seen it happen too many times.”).

112. Wall Testimony, *supra* note 8 (emphasizing the importance of in-house lawyer involvement when MDPs are hired: “Had not a company lawyer been present at the proposal conference, the human resources, tax and finance people might not have been aware that a consultancy lawyer was present [thus breaching the non-disclosure agreement] and the company would have been deprived of getting the legal advice it really needed.”).

113. *Id.*

114. Terrell, *supra* note 63, at 1006.

115. *Id.* at 1006-7; see also Campillo, *supra* note 46, at 22 (“If you wear two hats as I do, you can find yourself giving advice to yourself . . . I have certain

"ethics conscience of the corporation."<sup>116</sup> They lead the company in community service efforts, and conduct internal investigations. They ensure the activities the company undertakes are not only legal but of the highest ethical standard in the market place.<sup>117</sup> Sometimes, the General Counsel "persuad[es] management to act more ethically than the law demands."<sup>118</sup> One of the General Counsel interviewed described his job as "deciding what is the right moral thing for the company," explaining that he "gets to be the public conscience" for the company.<sup>119</sup> Clients rely on the General Counsel to play this moral role. As one General Counsel put it, "my company looks to me to provide the Boy Scout point of view."<sup>120</sup>

D. General Counsel Already Work Within an MDP Environment and Have Experience Negotiating Complex Issues Surrounding MDPs

Some might argue that outside counsel could play the role of MDP Quarterback just as well as General Counsel. However, General Counsel have an important advantage: they are already actors within an MDP environment.<sup>121</sup> Therefore, filling this

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areas of management responsibilities and I'm also the lawyer who is responsible for advising management.") (statement of in-house counsel).

116. Telephone Interview with AnonymousH, *supra* note 9; see also Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 6-7; Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 284 ("General Counsel also function as a conscience, persuading the management to conform its conduct to the law and perhaps, on occasion, even persuading management to act more ethically than the law demands.").

117. Telephone Interview with AnonymousH, *supra* note 9.

118. Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 284.

119. Telephone Interview with AnonymousF, *supra* note 9.

120. Telephone Interview with AnonymousT, *supra* note 9.

121. Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 8 (highlighting that the problems companies face are multidisciplinary as are the best solutions to those problems). Hackett further states:

MDP part of in-house practice is a big plus for most in-house counsel about their jobs: they love the ability to team with other groups of professionals who each bring unique expertise to the table. They don't believe that only lawyers can solve complex problems, and there is no desire to 'gold-plate' their solutions.

*Id.*; see also Roster, *Reengineering*, *infra* note 186.

Quarterback position is not a dramatic shift. General Counsel routinely practice in a multidisciplinary setting on multidisciplinary task force teams.<sup>122</sup> They manage teams that are made up of non-lawyers. They work on projects and provide counseling outside the practice of law. One of the main reasons why General Counsel are supportive of the introduction of MDPs into the United States is that the arguments people make against MDPs are the same ones that were used unsuccessfully against allowing in-house counsel.<sup>123</sup> As one interviewee explained, General Counsel are not sure what this debate is all about. These are "things General Counsel have been doing for years. When we have a particular matter we always form an MDP team and work together to solve a problem."<sup>124</sup> An MDP Quarterback will oversee projects across different divisions of the company. He/she will use both legal and business expertise to manage cross-functional teams, projects and risks. What "General Counsel have been doing for years" is what the MDP Quarterback role is all about.

More specifically, General Counsel (unlike other senior managers and unlike outside counsel) have daily experience negotiating the complex issues surrounding lawyers joining MDPs, mainly attorney-client privilege, independence of judgment, and conflicts of interests.<sup>125</sup> General Counsel already

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122. Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 8.

123. Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 271 (noting that "for a long time, the legal profession seriously questioned whether in-house counsel could exercise the requisite degree of independence of professional judgment. Those questions have largely disappeared. Similar reservations were once expressed about the lawyers employed by legal services organization, unions, and prepaid legal plans. Those reservations too have disappeared."). Ironically, the arguments against lawyers joining MDPs are the same arguments that were made (unsuccessfully) against allowing companies to hire in-house counsel in the first place—*i.e.*, independence, conflicts of interest, and attorney-client privilege.

124. Telephone Interview with Anonymous]], *supra* note 9.

125. See Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 264; Wall Testimony, *supra* note 8; see Matheson & Favorite, *supra* note 2, at 599-606 (discussing the arguments against MDPs such as lawyer independence, client confidentiality, damage to the profession's reputation, the unauthorized practice of law, the conflicts of interests—*i.e.*, between seeking profits and serving clients); see

face the "special character of . . . ethical dilemmas" that lawyers and their non-lawyer partners and hence their clients will face with MDPs.<sup>126</sup> Therefore, lawyers and other professionals in MDPs should actually want the General Counsel—as opposed to some other senior executive—to take on this expanded role since the General Counsel can ensure they do not inadvertently break the rules and in the process injure their clients and the reputation of the legal profession. As one General Counsel explained, the issues around MDPs are "easier if the company uses MDPs in a way that will naturally include General Counsel."<sup>127</sup> In short, it is the General Counsel that can help both the client and the MDP professionals overcome the ethical hurdles around: 1) confidentiality and the attorney-client privilege, 2) lawyer independence, and 3) conflicts of interest.

### 1. Confidentiality/Attorney-Client Privilege

General Counsel can safeguard confidentiality<sup>128</sup> because most General Counsel have experience oscillating between wearing a business and a legal hat.<sup>129</sup> It is "a tricky business given

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*Multidisciplinary Practice: Is It the Wave of the Future, or Only a Ripple?*, 66 DEF. COUNS. J. 460, 478 (Oct. 1999) (noting "how little appreciation some of the non-lawyers who supervise lawyers have for the meaning of [the legal profession's] code of conduct" especially important canons like confidentiality and independence); Moore, *supra* note 41, at 499 (mentioning the "numerous conflicts that confront in-house lawyers such as . . . the conflicts arising from some lawyers' dual roles as both legal and business adviser," duties of confidentiality, and conflicts of interest between the company and its individual constituents).

126. Hazard, *supra* note 39, at 1012.

127. Telephone Interview with AnonymousK, *supra* note 9.

128. See Roster, ACCA Remarks, *supra* note 3, at 10-13; Matheson & Favorite, *supra* note 2, at 601 ("Some argue that closer integration between lawyers and other professionals will bring numerous violations of ethics rules and jeopardize client interests.").

129. See Molvig, *supra* note 40, at 17 (noting that "corporate counsel often wear two hats: legal advisor and business advisor"); Telephone Interview with AnonymousB, *supra* note 9.

the ethical issues around privilege/confidentiality.”<sup>130</sup> General Counsel, however are “careful about instructing when the [legal] hat is on and the hat is off.”<sup>131</sup> By doing so, they separate the legal from the business advice and thus protect the privilege.<sup>132</sup> The Vice President of the Legal Department of a large computer company explained “there is always the challenge to think and respond in a somewhat compartmentalized way so that our clients understand when we are giving legal advice and when we are serving as another member of the senior team.”<sup>133</sup> It is not an easy task, yet it is a very important one. In the MDP context, the General Counsel can help “ensure that the client sufficiently understands that the lawyers and non-lawyers at the MDP may have different obligations with respect to disclosure of client information and that the courts may treat the client’s communications to the lawyers and non-lawyers differently.”<sup>134</sup>

The General Counsel as MDP Quarterback will help safeguard confidentiality and, in turn, help the MDP service the client better. The partners in MDPs are in the client-service business and “the key to getting and keeping business is client confidence in the quality of the advice and the certainty of nondisclosure of information.”<sup>135</sup> Destroying the protection of confidentiality and the attorney-client privilege can have huge negative ramifications.<sup>136</sup> Moreover, as Professor Daly points out

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130. Telephone Interview with AnonymousB, *supra* note 9 (discussing the difficulty in wearing the two hats and saying “it is much easier to signify when the legal hat is on/off via written communication than verbal”); *see also* Weiss, *supra* note 69, at 397-98 (pointing out that in protecting the attorney-client privilege, distinguishing between legal and business advice is difficult).

131. Telephone Interview with AnonymousH, *supra* note 9.

132. *See* Campillo, *supra* note 46, at 22 (quoting various corporate counsel discussing how they are careful to “separate legal advice from business advice” to ensure they do not forsake the attorney-client privilege).

133. Telephone Interview with AnonymousB, *supra* note 9.

134. Matheson & Favorite, *supra* note 2.

135. Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 266.

136. *See, e.g.*, Campillo, *supra* note 46, at 22 (“If an attorney isn’t careful about staying on the legal side and later attempts to assert the attorney-client privilege, the privilege may be questioned by opposing counsel under the guise that you were giving business advice or mixing business with legal advice.”) (statement of a corporate counsel). *Contra* Telephone Interview with

in her article "*Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Service From Lawyers in a Multidisciplinary Partnership*," it is left up to the MDPs to "adopt effective measures to ensure that their clients appreciate the circumstances in which the attorney-client privilege will protect their communications with the firm's lawyers and those in which it will not."<sup>137</sup> This job is made easier for the MDP—and the client is better protected—with the General Counsel in the Quarterback role because the General Counsel (in addition to having experience dealing with the conflict) understands the inner workings and objectives of the company in a way an outsider simply cannot.<sup>138</sup> The MDP Quarterback will know who is working with whom, on what projects, and in what manner. Therefore, he/she can ensure that when a non-lawyer is assisting a lawyer by providing non-legal services in connection to legal services, "the MDP has in effect measures to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer."<sup>139</sup> With a responsible and careful group of MDP professionals AND a General Counsel as the MDP Quarterback, it is a win-win situation for both the MDP and the client.

## 2. Lawyer Independence

One of the "primary concerns" of those that oppose MDPs, is the "threat to a lawyer's independent judgment. When a lawyer has intimate strategic and financial attachments to non-legal professionals, so goes the argument, there are bound to be frustrating obstacles to an independent judgment."<sup>140</sup> Most General Counsel work in practice settings in which they are

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AnonymousMc, *supra* note 9 (mentioning that he had been a General Counsel for 20 years and had never invoked the attorney-client privilege and therefore, would not rest a hypothesis on this aspect). None of the other interviewees downplayed the importance of the attorney-client privilege.

137. Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 267.

138. It is not merely that the General Counsel provides better protection—the question is, why would a company *choose* to leave such an important issue in the hands of the service provider?

139. Matheson & Favorite, *supra* note 2, at 601.

140. *Id.* at 599.



subject to management by non-lawyers and “independence has been maintained in those settings.”<sup>141</sup> Most General Counsel already play roles in which they wear both a legal and a business hat at the same time.<sup>142</sup> As mentioned above, General Counsel participate as business executives, not just as attorneys in the long-term strategic decision making for the company. They are a part of the company like the other senior executives and at the same time apart from the company, serving as the legal guardian. “The General Counsel has one foot planted firmly in the shifting, treacherous terrain of the law, and the other planted just as firmly in the oozing swamp of business.”<sup>143</sup> It is “always challenging” to balance between the two.<sup>144</sup> It forces General Counsel to be a creative problem solver.<sup>145</sup> General Counsel “try to apply a kind of legal framework” to business issues “that gives the client things to work with, options.”<sup>146</sup> General Counsel give advice and input on the non-legal aspects of business. As many of the General Counsel interviewees explained, however, almost every discussion has a legal implication that a General Counsel must provide as well.<sup>147</sup> General Counsel have to find ways to manage

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141. *Id.* at 600.

142. *See* Molvig, *supra* note 40, at 17 (noting that “corporate counsel often wear two hats: legal advisor and business advisor”).

143. Terrell, *supra* note 63, at 1005.

144. *Id.*; *see* Molvig, *supra* note 40, at 17:

Ethically you have to draw a line between business advice and legal advice . . . if you don’t draw that line and then later attempt to assert attorney-client privilege or attorney-work-product privilege, the opposing counsel may try to argue that the privilege doesn’t apply because you were providing business advice, or mixing legal and business advice. So if you’re not careful, you could lose your right to claim the usual privileges that shield your work.

*Id.* (quoting a corporate counsel interviewee); Campillo, *supra* note 46, at 22 (noting that corporate counsel have “to be careful to remain objective and separate legal advice from business advice”).

145. *See* Douglas, *supra* note 74, at 5 (recommending that in-house counsel should be problem solvers and “help the client solve the problem, even if it requires your help or action outside the traditional ‘limits’ of legal advice”).

146. Telephone Interview with AnonymousB, *supra* note 9.

147. *See, e.g.*, Hackett, *The Future of In-House Law Dep’ts*, *supra* note 15, at 5 (“There’s very little . . . that is a business function without a legal impact: the client’s legal protection is imbedded in most all company projects.”); Telephone Interviews with AnonymousB and AnonymousH, *supra* note 9. *See also* Chayes

the intersection of business and legal issues without sacrificing independent legal judgment. It is this tap dance that makes the General Counsel valuable<sup>148</sup> to their companies and invaluable in the role of MDP Quarterback. Because General Counsel know how to resist the pressure from their non-lawyer business peers so that independent legal judgment is not sacrificed,<sup>149</sup> they will be more able to recognize when their lawyer-MDP counterparts are being influenced. Since, as discussed above, General Counsel are recognized as the conscience of their companies (noted above), their point-of-view will have more weight.<sup>150</sup>

### 3. Conflicts of Interest

General Counsel are more attuned to conflicts of interest and able to protect against them since they deal with conflicts of interest daily. General Counsel negotiate the fine line between serving the company versus the employees everyday. Moreover, General Counsel are "always engaged in a unique balancing act" between their own interest in making a profit and providing valuable service to their clients.<sup>151</sup> The General Counsel can ensure conflicts of interest agreements are made at the outset of the relationship and check up on the MDPs' client rosters to ensure the MDPs do not cross the line. Importantly, some General Counsel in the United States already have experience

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& Chayes, *supra* note 40, at 281 (explaining that "even transactions that are not legally intensive or of major significance are likely to involve inside counsel" because inevitably it will involve the law and it is more efficient and effective to have early involvement of in-house counsel).

148. Telephone Interview with AnonymousF, *supra* note 9.

149. See Terry, *A Primer on MDPs*, *supra* note 2, at 927 (noting that we expect corporate counsel to honor lawyer ethical obligations regardless of the pressure).

150. There is a great deal of debate whether lawyer independence is an issue. Those that feel it is an issue, feel strongly that it is up to the lawyers to "manage the practice." Roster, ACCA Remarks, *supra* note 3, at 19-20 (quoting Mr. Sherwin P. Simmons, Chair of the ABA Commission on Multidisciplinary Practice, and Partner at Steel, Hector & Davis). Even if the MDP has a lawyer managing the process on their end, having a lawyer on the client side will still be helpful to safeguard against breaches.

151. See Matheson & Favorite, *supra* note 2, at 606.

dealing with such issues with actual MDPs. General Counsel of global companies<sup>152</sup> have already had to deal with how to protect attorney-client privilege when hiring an MDP in a foreign country<sup>153</sup> and how to ensure that MDPs aren't representing clients with conflicts of interest.<sup>154</sup> In short, having a General Counsel in this new expanded role helps clients and the MDPs. It will put clients' minds at ease and prevent them from steering clear of MDPs for fear that the risks outweigh the benefits of them.<sup>155</sup> This, in turn, will help MDPs more successfully sell in their services.

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152. It is not practical to look at the role General Counsel of foreign corporations are playing in the countries that allow MDPs in order to hypothesize about the role General Counsel will play here in the U.S. This is because of the completely different way General Counsel are viewed, trained, and educated in other countries as noted in earlier in this Article in Part III.B. See Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 9 (noting that in-house counsel are not part of the bar in France and Japan); Josephine Carr, *Germany: Time for a Change?* (noting that the "in-house lawyer in Germany is often isolated within the company"), available at [http://www.lawdepartment.net/scripts/article.asp?Article\\_ID=1608](http://www.lawdepartment.net/scripts/article.asp?Article_ID=1608) (on file with author); Daly, *The Role of the General Counsel*, *supra* note 7, at 1077-78 (commenting that in civil law countries, in-house lawyers "seem to be more narrowly focused on just the legal aspects of a problem" and "proactive lawyering is less common").

153. Daly, *The Role of the General Counsel*, *supra* note 7, at 1087 (noting that "a General Counsel acting as a purchasing agent in many situations must weigh the legal value and financial costs of hiring a foreign law firm or an accounting firm or using its own-in-house staff. Preservation of the privilege is not always an overriding consideration. It depends on the "prospect of future litigation").

154. See *id.* at 1097.

[T]he General Counsel of a global organization must still decide whether and to what extent he should demand that the foreign law firm not represent the client's business competitors . . . [Since] it is strictly a business decision . . . it is incumbent upon the General Counsel to communicate this exception at the outset of the engagement, if the client expects that the foreign law firms which it retains will not represent its competitors.

*Id.*

155. See Roster, *ACCA Remarks*, *supra* note 3, at 12-13. One might even argue, then, that the MDPs should be pushing for General Counsel to take on this expanded role because General Counsel, acting in this role, may help make the client feel better protected. Thus, the client may be more willing to try an MDP when otherwise they would not. In other words, General Counsel acting

E. General Counsel Are Leaders of the Legal Profession and Agents of Change

MDPs have never been formed in the United States, and as mentioned above, there are many risks and complex issues involved. Therefore, the people that fill this new role will have to be proactive, adaptive, courageous, and creative. According to my research, these adjectives describe General Counsel.

General Counsel are known for the effect and influence they have had on the legal services industry.<sup>156</sup> For example, the concept of billable hours was driven by in-house counsel who came to their clients with experience at big law firms and an understanding of where the padding was in the billing. They demanded the legal profession change how they billed their clients so they could closely monitor the project and its costs. In addition to demanding pricing detail, they demanded better service for a better price. Moreover, General Counsel entered their jobs with experience and connections. They knew what they wanted and importantly who they wanted working on their projects—*i.e.*, specific firms and partners.<sup>157</sup> Moreover, they developed the bidding process—conducted “beauty contests”—to ensure they hired the best firm for the best value.<sup>158</sup>

Today, General Counsel are still leading the legal profession and changing the nature of legal services.<sup>159</sup> They find new ways to service their clients by continually recreating themselves, taking on new responsibilities and changing with the market. For example, in response to a complaint that their form contracts were not user-friendly, the corporate legal department of Astra did not simply change the form contracts. Instead, they sought the root of the problem and discovered that there was a need for

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in this new role might help secure business an MDP would otherwise lose from risk-adverse companies.

156. See Samuelson, *supra* note 7, at 336 (“Over the past twenty years, corporate counsel have had a profound influence on the legal industry.”).

157. Telephone Interview with AnonymousH, *supra* note 9.

158. General Counsel Interviews, *supra* note 9.

159. See Hackett, *The Future of In-House Law Dep’ts*, *supra* note 15, at 7 (noting that “in-house counsel often lead the profession since they are closer to client legal management strategies and innovative ways of working.”).

"training and changes in the business process."<sup>160</sup> To address this need, they developed an IT-based solution that "exceeded both legal and business needs." The revised form contracts "brought value to the corporation, but that value was dwarfed by the value of context customization and the additional tools in the database that empowered users to do their jobs better and faster."<sup>161</sup>

Moreover, to create effective and efficient solutions, General Counsel are "increasingly at the front of the movement to measure performance," through "metrics, valuation, creative benchmarking, and best practices work."<sup>162</sup> When Michael Roster (EVP & General Counsel of Golden West Financial Corporation), was hired as the General Counsel of Stanford University and Medical Center, one of the first things he did was evaluate the performance of his department and make drastic innovative changes to lower costs. He reduced the in-house staff from twenty-six to seven and then bid out the legal work and legal positions.<sup>163</sup> He hired outside counsel at a fixed price to act as contract, in-house lawyers. They had offices on-site and sat in on meetings as if they were a part of the company (as consultants do when they outsource a functional department for their client).<sup>164</sup> According to anonymous sources, he was able to bring total legal costs down by 25%.

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160. Thomas F. McCaffery, III, et al., *The Electronic Barrister: Delivering Client Value with Information Technology Solutions*, at 7 [hereinafter McCaffery, *The Electronic Barrister*], available at <http://www.acca.com/protected/pubs/docket/nd98/barrister.html> (last visited Feb. 20, 2001).

161. *Id.* Arguably, this example also represents how General Counsel move routine work out of their department with the goal of "counseling the attorney out of a job." See Thomas F. McCaffery, *Designing a Business Process for the In-house Corporate Legal Function*, at 4 [hereinafter McCaffery, *Designing*], available at <http://www.acca.com/protected/pubs/docket/ja98/bpr.html> (on file with author).

162. Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 9.

163. See Michael Roster, *Reengineering the Legal Function*, ACCA Docket, Sept./Oct. 1995, at 29 [hereinafter Roster, *Reengineering*].

164. *Id.*

In addition to "requir[ing] outside counsel to change to meet clients' needs,"<sup>165</sup> General Counsel are changing themselves and their own staff to ensure they meet their clients' needs. General Counsel train, hire, and promote a more competent, experienced, eclectically skilled and diverse workforce than that at a typical law firm. "Where outside counsel are still only fighting for the top five graduates from the top five schools and expecting them to bill 47,000 hours of truly valuable time in their first three months," General Counsel focus on hiring laterally, considering merit and experience and expecting their in-house attorneys to "manage themselves, their time, their employees, [and] their teams."<sup>166</sup> Moreover, General Counsel are able to retain the best professionals by employing innovative compensation strategies and perks like stock options, virtual employment, and the opportunity for lateral movement into non-legal business functions.<sup>167</sup>

General Counsel ensure that their skills are not outdated. As the Vice President of the Legal Department of a large computer corporation explained

[I]t is really incumbent on lawyers to study the industry, understand the competitive marketplace, understand the emerging technologies and how they play into company business strategies and so on. You have to be relevant and have to continue to be relevant and prove yourself every day, to the business. If we as in-house lawyers continue to have that attitude, continue to be relevant and cost effective and understand the cutting edge issues better than any outside counsel do, we'll still be there. If we become complacent on those issues then the client will find a new way to get it done.<sup>168</sup>

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165. Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 7.

166. *Id.* at 7-8; *see also* Telephone Interview with AnonymousB, *supra* note 9 (saying that part of her responsibility was to hire and retain the "best and brightest").

167. *See* Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 8; General Counsel Interviews, *supra* note 9.

168. Telephone Interview with AnonymousB, *supra* note 9.

To that end, General Counsel are more technologically savvy than their outside counsel counterparts.<sup>169</sup> IT-based solutions, like that of Astra noted above, is merely one example of how General Counsel leverage changes in the business world to their advantage. Adapting to the market, staying relevant, is how General Counsel keep their jobs.

As alluded to above, the General Counsel's role is proactive. Many General Counsel were attracted to the position because the General Counsel is "an architect of legal strategies"—not just called upon to "fix legal trouble after the fact."<sup>170</sup> Being a General Counsel offers the opportunity to be "part of the development of positions and issues and decisions rather than the after the fact damage control of the archeology . . . it's a shift from archeologist to participant."<sup>171</sup> To that end, General Counsel offer anticipatory, long-range legal planning and services by developing programs for preventing legal aspects from turning into problems.<sup>172</sup> It is this type of preventative thinking that companies need to prevent Enron-like debacles and other risks that MDPs may pose.

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169. Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 9 (predicting that in-house law departments "will lead the way in developing: secure legal platforms where work will be conducted in the future; intranets and extranets; electronic filing and matter management systems; shared knowledge resources/online publications and legal resource material; virtual teaming; [and] creative [technological] partnering strategies").

170. See Molvig, *supra* note 40, at 17; General Counsel Interviews, *supra* note 9; Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 5 ("Outside counsel are called to clean up spilt milk; in-house counsel keep it in the glass in the first place."); Chayes & Chayes, *supra* note 40, at 281 (stating that "the General Counsel, as a part of senior management, is committed to optimizing business success, and has both the right and responsibility to insist upon early legal involvement in major transaction[s]").

171. Telephone Interview with AnonymousL, *supra* note 9.

172. Chayes & Chayes, *supra* note 40, at 280. See also Molvig, *supra* note 40, at 16; Telephone Interview with AnonymousM, *supra* note 9 (explaining that he is involved in "business issues that have legal implications. It's a way to be more strategic in [his] work and get involved at the front end of major business initiatives to build in appropriate legal safeguards early on"); Telephone Interview with AnonymousO, *supra* note 9.

Moreover, "unlike their outside peers, who still hang on to the idea that law is for lawyers, in-house counsel have begun to expand their thinking to realize that law is for clients."<sup>173</sup> Freed from the shackles of the billable hour, General Counsel innovate change in the way they practice law to add value. For example, a goal of many General Counsel is to "counsel themselves out of a job."<sup>174</sup> They make legal work routine so it can be sent out of the costly, legal department and done by the other business units.<sup>175</sup> They develop things like Database v.2.0 and "statistical models for the settlement of product liability and mass tort claims."<sup>176</sup> Because they continually morph their skills and services, the only job they end up counseling themselves out of is performing the routine legal work. Thus, they are able to focus more time on the important issues that make a difference to the business.

There is so much unknown about MDPs; how they will work, how they will affect businesses, and what risks and issues they may create. If their history and reputation is anything to go by, then, "General Counsel are the lawyers to trust to find innovative ways to deal with the issues we don't even know about yet."<sup>177</sup> This is because making a difference and revolutionizing the legal system is the General Counsel's goal. For many, the best thing about their job is "the fun of creating something brand new that will have significant impact in the way lawyers do their work from now on—[the] potential to revolutionize the way the legal system work."<sup>178</sup> One General Counsel summed it up perfectly: "As [General Counsel] have revamped legal services in the legal

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173. Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 1.

174. McCaffery, *Designing*, *supra* note 161, at 4.

175. *Id.*; see also Douglas, *supra* note 74, at 6; Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 7.

176. Chayes & Chayes, *supra* note 40, at 297.

177. AnonymousH may be the only one to have such a positive vision because her job is to promote attorneys.

178. Telephone Interview with AnonymousJJ, *supra* note 9. In keeping with that thought, AnonymousJJ helped lead the development a global public affairs and public relations firm started as a subsidiary of an advertising agency. AnonymousJJ is now the cofounder and General Counsel of an internet communications company. Thus, not only is AnonymousJJ keeping with the times, he is proactively changing the way lawyers do business and fundamentally changing the legal profession.



community, General Counsel can also impact the way MDP service is delivered to the new world."<sup>179</sup>

### III. MDPs POSE RISKS TO GC'S ROLE, POWER, AND INFLUENCE

As explained above, the introduction of MDPs into the United States represents an opportunity for General Counsel to expand their role in the companies for which they work. General Counsel could become their companies' MDP Quarterback. However, as is true with most opportunities, however, the flip side is risk. If General Counsel do not leverage this opportunity, the changes in the marketplace could instead represent a risk to General Counsel's control over and influence on the legal and business work they do for their clients. Through my research, I uncovered four risks to the General Counsel's role should MDPs be introduced into the United States. Each of these risks differs in its magnitude and likelihood of occurring. Should the risks go ignored, however, each has the potential to cause damage to the General Counsel's role. Again, a major goal of this Article is to focus on the what-if's so General Counsel can prepare for MDPs and surmount the risks.

#### A. The Legal Department May Be Outsourced to MDPs

If MDPs are introduced, the General Counsel's role and staff could be outsourced to an MDP. This risk might occur when an MDP services the client so well in other business areas that it is able to convince the client that it can handle the client's legal business at the same quality level for a better price. Professor Daly points out in her article "*Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Service From Lawyers in a Multidisciplinary Partnership*":

PSFs excel at obtaining outsourcing business from corporate clients. They have created powerful arguments that management should concentrate all its energy on strategic business planning and leave support-related matters to the PSFs, including payroll, human resources, technology, and

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179. Telephone Interview with AnonymousH, *supra* note 9.

training. MDPs are certain to make similar claims with respect to legal services as well.<sup>180</sup>

In fact, they already have according to Mr. Sherwin P. Simmons, Chair of the ABA Commission on Multidisciplinary Practice and Partner at Steel Hector & Davis. He remarked at ACCA's 1999 Annual Meeting in San Diego that at least one international accounting firm has gone to a CFO with a recommendation to outsource their legal services and a promise to cut legal costs.<sup>181</sup> Although it does not appear that outsourcing has been a prevalent practice by MDPs internationally,<sup>182</sup> it still represents a risk. MDPs—even internationally—remain in their infancy. So just because they have not done it yet does not mean that they will not in the future. A Global Managing Partner of Accenture mentioned that in addition to being a business advisor, Accenture might migrate toward being a primary outsourcer of non-core activities. He explained that once they became competent in outsourcing, it may make sense to engage attorneys and provide them on an outsource basis to clients. He added that

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180. Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 283–84; *see also* Telephone Interview with AnonymousE, *supra* note 10:

[There] has been an outsourcing wave and [his PSF] might—along with being a business advisor—migrate to being a primary outsourcer of non-core activities. So it may make sense to engage attorneys and provide them on an outsource basis to clients. This would usurp in-house lawyers since [his PSF] would be taking over most of the staff in-house and therefore it would also affect the role of the General Counsel since the General Counsel's staff would be diminished and the outsourced attorneys would be getting their overall direction from [his PSF].

*Id.*

181. *See* Roster, ACCA Remarks, *supra* note 3, at 18.

182. One of the author's professional service firm contacts, AnonymousW, claimed his company's MDP has not yet attempted to do this in Europe or Asia. AnonymousW did not believe that this would be one of his company's goals in the United States:

Our belief is that we are there to make companies better and to use our knowledge and expertise to help them make better business decisions and investments. We're not looking to go in and displace [anyone]. I do not see us as a threat to the General Counsel. We've never been a threat to the CFO . . . this is not spin. The client is the hero. We're just there to add insight and perspective.

Telephone Interview with AnonymousW, *supra* note 10.

this would usurp in-house lawyers' positions (since Accenture's employees would be replacing most of the in-house staff). Moreover, it would specifically impact the role of the General Counsel since his/her staff would be diminished and the outsourced attorneys would be getting their overall direction from Accenture.

Oddly enough, clients may be the impetus behind a move to outsource legal work. For example, in spring 2001, a client had asked Accenture to evaluate outsourcing human resources, finance, and legal services.<sup>183</sup> A Managing Director at E&Y Capital Advisors LLC (wholly owned subsidiary of Ernst and Young) also believed that clients would want the legal function to be outsourced.<sup>184</sup> He said that if MDPs are allowed in the United States and E&Y had a team of in-house mergers and acquisition ("M&A") attorneys, "it would be a very easy sell and very appealing to the client for E&Y to do the attorney-work." Furthermore, he explained, "to the extent that [his] clients believe E&Y is a credible, professional source for consulting, [his] clients would also think this of [their] legal advice." He so believes this because many of his clients ask his firm to recommend a law firm to conduct M&A legal work, and E&Y is already involved in law-firm "beauty contests" for many of its clients.

Interestingly, even some General Counsel believe that outsourcing the legal work may be the right move for certain clients and have actually recommended it.<sup>185</sup> One General Counsel interviewed chose, in his former job as a General Counsel of a large university in California, to outsource the in-house legal function. By doing so, he was able to bring costs down and client satisfaction up without sacrificing the quality of work. He explained that the lawyers from the outsourcing firm were able to learn the culture and the business as if they were in-house attorneys.<sup>186</sup> Combine this evidence with the fact that in-

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183. Telephone Interview with AnonymousE, *supra* note 10.

184. Telephone interview with AnonymousLU, *supra* note 10.

185. See Roster, Reengineering, *supra* note 163, at 29; Telephone interview with AnonymousR, *supra* note 9.

186. AnonymousK disagreed, believing that the MDP people "wouldn't have the dedication and commitment of the in-house team." Telephone Interview with AnonymousK, *supra* note 9.

house legal departments "are now frequently challenged to demonstrate the value, efficiency, and cost-effectiveness of their services—even to justify their very own existence"<sup>187</sup> and the risk of outsourcing seems real.

The reality of the risk, however, is tempered by the consensus among most of the General Counsel interviewees that a MDP's attempt to outsource the legal department would not be successful.<sup>188</sup> Eight of the fourteen interviewees did not feel outsourcing was a risk.<sup>189</sup> They felt safe from this threat because most of them did not believe an MDP could more efficiently outsource a legal department.<sup>190</sup> This doubt is also supported by research that shows that most in-house departments are already lean (70% of in-house departments are made up of one to ten lawyers)<sup>191</sup> and efficient.<sup>192</sup> In fact, efficiency is the hallmark of in-

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187. Norman K. Clark, *Three Questions for Corporate Law Departments to Ask Before Outsourcing Legal Work to Law Firms*, at 4, available at

[http://www.altmanweil.com/publications/articles/outsourcing/body\\_os1.htm](http://www.altmanweil.com/publications/articles/outsourcing/body_os1.htm) (on file with author). See also CLO Survey, *AM2K-Delivering Strategic Solutions Questionnaire Results*, Nov. 2000, at 5 [hereinafter CLO Survey] (citing cost effectiveness as one of the main reasons why corporate counsel believe their law department is outsourced), at

[http://www.altmanweil.com/whats\\_new/body\\_acca.html](http://www.altmanweil.com/whats_new/body_acca.html) (last visited Mar. 17, 2001) (on file with author). More specifically, the study showed that 34% of the 77 chief legal officers surveyed rated the pressure to reduce legal costs in their corporation as a "perennial issue," 22% said the issue "comes up on occasion" and 11.7% said the pressure was "heavy . . . but manageable." *Id.* at 6.

188. In addition, the fact that ACCA has endorsed MDPs supports the idea that this risk is not a large one. See ABA, *Primer on MDP*, *supra* note 1, at 2.

189. General Counsel Interviews, *supra* note 9. Only six interviewees felt outsourcing was a risk: AnonymousF, AnonymousR, AnonymousMc, AnonymousB, AnonymousY, and AnonymousH.

190. This is consistent with the CLO Survey. See CLO Survey, *supra* note 187, at 6-7 (finding 86% of the 77 chief legal officers surveyed said the prognosis for the future of the in-house legal department was "great" or "OK, they'll continue to exist as they are" because of the economic value of the department).

191. Approximately 46.5% of in-house departments are made up of two to ten lawyers; 23.4% have only one lawyer, and 11.7% are made up of 11-20 lawyers. See Association of Corporate Counsel, at <http://www.ACCA.com> (last visited Mar. 17, 2001) (on file with author). But see Telephone Interview with AnonymousR, *supra* note 9 (commenting that outsourcing is a risk because outside and inside lawyers are inefficient and the service firms can sit in at the client and learn the business just as well).

house counsel—the *reason* in-house positions were developed.<sup>193</sup> As the Vice President of the Legal Department at a large computer corporation put it “there is a premium placed on efficiency and responsiveness.”<sup>194</sup> To that end, she ensures her department has a lower cost structure than competitors’ in-house legal departments.<sup>195</sup> She explained that the in-house legal function becomes at risk whenever it stops being responsive and efficient. Therefore, she did not believe the risk of outsourcing was specific to MDPs. An MDP “may not present any more risk to that sort of thing than some other huge law firm that’s able to provide a wide range of legal services.”<sup>196</sup> Another General Counsel interviewee was flabbergasted with the idea that an MDP would be able to outsource the in-house department. He explained that the client would not receive the same quality of work, cost effectively, from an MDP.<sup>197</sup> “If in-house departments are going to be replaced, it is more likely by law firms than by MDPs.”

Another General Counsel expressed similar doubt about the ability of an MDP to take-over the in-house legal department. He

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192. See Clark, *supra* note 187, at 4 (“[I]n house counsel are already providing legal services at a lower cost than a law firm would.”). This is not to say that small departments equal efficiency. Indeed, having a larger legal staff may actually be more efficient as a company could then dramatically reduce outside firm charges. However, since most law departments are small and most are efficient, there may be a correlation.

193. See Samuelson, *supra* note 7, at 336 (“Over the last twenty years, however, spurred by evidence that legal work can often be handled inside at less than two-thirds the cost of outside firms, corporations have brought more and more of their work in-house.”).

194. Telephone interview with AnonymousB, *supra* note 9.

195. AnonymousB said it was “not likely that a PwC could come into her computer company and put together a more efficient cost model.” Telephone Interview with AnonymousB, *supra* note 9.

196. AnonymousF also believed that outsourcing was a risk that was not specific to MDPs. However, he felt that outsourcing, in general, was a risk for the in-house law department. He constantly “questions how much value . . . the in-house department provide[s] . . . and how cost effective” it is. Telephone Interview with AnonymousF, *supra* note 9.

197. AnonymousO based this statement on the idea that the MDPs would be one of the Big 4 and his extensive experience working with the Big 4. Telephone Interview with AnonymousO, *supra* note 9.

also suggested that CFO's share the same doubts about MDPs.<sup>198</sup> He explained:

You might want an MDP for something with enormous discovery requests . . . because they are number crunchers and can organize . . . but do you want them in front of a jury or for depositions? . . . In my experience, there are few CFOs that will turn over their fate to a Big 5 accounting firm—they [too] are not thrilled with timing or costs of outside service—so there would have to be a quantum leap in quality or quantum drop in costs before a CFO would even be interested in this.

Similarly, another General Counsel did not believe an MDP could be more efficient and she felt that the quality and client satisfaction would diminish: "they wouldn't have the dedication and commitment of the in-house team."<sup>199</sup>

Not only are General Counsel skeptical about the reality of the risk, but some potential MDPs are also skeptical about their ability to outsource legal work efficiently. A director from Anderson hinted it was not an easy equation. "We're still [questioning] whether we can make it pay for our clients and Andersen to outsource the finance function and we've been doing that for 88 years."<sup>200</sup>

Moreover, it is not clear that efficient outsourcing by MDPs would put the General Counsel's role in jeopardy. Most of the interviewees felt their jobs were safe even if an MDP put together a more efficient cost model for legal services. They believed there would still be a great need for General Counsel given their in-depth knowledge of the business and relationships with the executives in the company.<sup>201</sup> One General Counsel summed it

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198. Telephone Interview with AnonymousMc, *supra* note 9.

199. Telephone Interview with AnonymousK, *supra* note 9. *Contra* Telephone Interview with AnonymousR, *supra* note 9 (claiming that quality and client satisfaction at the university went up with outsourcing).

200. Interview with AnonymousW, *supra* note 10.

201. *E.g.*, Telephone Interview with AnonymousMc, *supra* note 9 (commenting that "the skills of General Counsel will help them weather through this"); Telephone Interview with AnonymousF, *supra* note 9 (commenting that "you still have to have a General Counsel . . . [there is] still a role to be played by an officer of a company whose primary responsibility is asking the tough legal questions . . . if you get rid of that person it's a huge

up as follows: “there would still be a role for the General Counsel regardless of how big/small the legal department is . . . . You cannot (no matter how good the MDP is) get the same understanding of the business or working relationship with a business executive from the outside.”<sup>202</sup> Another General Counsel agreed, adding that “[t]he role of the person on the inside that can make decisions cannot be replaced by an outsider because they don’t live and breathe the issues or know the personalities involved.” Furthermore, a smaller legal department—a natural result of outsourcing—does not necessarily mean the General Counsel has less power or sphere of influence. In fact, one General Counsel believed it was because his department was so small (three people) that he had as much power as he did. He had the time to focus on the other business issues and meet with the other senior executives about the core issues and objectives of the company. In keeping with that, of the six General Counsel interviewees that ran very small departments (three or less people total), only one did not consider himself part of the senior strategic business team. That one person played a less strategic role by choice and is still heavily involved in business decisions.<sup>203</sup>

Even the CFO interviewed did not believe the role of General Counsel would be displaced if MDPs were formed in the United States because the value a General Counsel can bring to the table is significant. Ms. Desiree DeStefano, Chief Financial Officer of Sports Capital Partners, explained:

If only corporate record-keeping is needed, I often think that a good paralegal could substitute for a General Counsel with a good CFO as the boss; on the other hand, a General Counsel is very useful in reviewing operational contracts to buy and sell.

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mistake”); Telephone Interviews with AnonymousO, AnonymousD and AnonymousJ.

202. Telephone Interviews with AnonymousL and AnonymousD, *supra* note 9.

203. The six interviewees that run small legal departments are AnonymousJ, AnonymousO, AnonymousT, AnonymousJJ, AnonymousD, and AnonymousH. AnonymousO was the one General Counsel interviewee that did not sit on the strategic team. General Counsel Interviews, *supra* note 9.

And they add a lot of value in the human resource area, protecting against liability, choosing outside law firms, etc.

Similarly, a director at Andersen did not feel there was a risk to the General Counsel's role even if a client outsourced the majority of its legal work to Andersen:

Our belief is that we are there to make companies' better and to use our knowledge and expertise to help them make better business decisions and investments. We're not looking to go in and displace [anyone]. I do not see us as a threat to the General Counsel. We've never been a threat to the CFO . . . this is not spin—the client is the hero—we're just there to add insight and perspective.<sup>204</sup>

Instead of fearing the idea that MDPs will provide legal service, some General Counsel see it as a benefit. To that end, twelve of the fourteen General Counsel interviewed thought MDPs were a good idea and would be willing to use them for the work that they outsource. Mr. Alberto Terol, Managing Partner of Arthur Andersen and CEO of Andersen Legal, Garrigues & Andersen, explained at ACCA's 1999 Annual Meeting that the General Counsel "would have a counterpart in the organization who is a lawyer who understands broader business issues and can bring other resources on board as needed."<sup>205</sup> In sum, as long as General Counsel continue to provide efficient, valuable input, the risk of outsourcing likely will not materialize or if it does, it will not negatively impact General Counsel. Understanding the risk, however, will help General Counsel ensure that they do not let it become a reality in the future.

### B. Bias by International MDPs Against General Counsel

My research uncovered a second risk that was valid but also surmountable. General Counsel's power and influence when working with an international MDP may suffer the pervasive "cultural and structural biases against in-house lawyers" outside

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204. Telephone Interview with AnonymousW, *supra* note 9.

205. See Roster, ACCA Remarks, *supra* note 3, at 16.



the US.<sup>206</sup> These international biases against in-house attorneys are driven by several factors. First, internationally there still exist some misconceptions that General Counsel are second-class attorneys. Second, outside the United States, professionals openly “doubt the professional independence of the in-house lawyer.”<sup>207</sup> Third, there are striking “differences in [the] legal education and professional training” that lawyers receive outside the United States. Lastly, in civil law countries, law is compartmentalized such that General Counsel are not well-versed in their clients’ businesses and do not engage in the same wide range of activities for their companies.<sup>208</sup> Professor Daly in her article *The Cultural, Ethical, And Legal Challenges In Lawyering For A Global Organization: The Role Of The General Counsel* notes that General Counsel from other countries do not carry the same broad range of responsibilities or training as General Counsel in the United States. Therefore, “[i]t is difficult to imagine how the foreign General Counsel of a U.S. subsidiary . . . could effectively perform the . . . functions regularly assumed by General Counsel in the [United States].”<sup>209</sup> It is not difficult to see, however, how this difference in the respect and responsibilities of an international General Counsel could undermine the power and influence of a General Counsel in the United States that works with an MDP on a global scale.<sup>210</sup> This difference, therefore, must not be ignored. Eventually, General Counsel will have to bridge the cultural gaps with foreign companies.

Notwithstanding the potential problem, it does not appear to be a huge hurdle. Ten of the General Counsel interviewed worked within a global sphere. Most said, however, that they have not had much difficulty establishing themselves in a business/legal role with their counterparts, even in places like

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206. Daly, *The Role of the General Counsel*, *supra* note 7, at 1100. She also noted that “[e]ven in the United Kingdom, there are still people who hold the view that in-house lawyers are the castoffs of the legal profession . . . the failures who didn’t make partner.” *Id.*

207. *Id.* at 1101-3.

208. *Id.*

209. *Id.* at 1102.

210. *Id.* at 1109.

India, Jakarta, and Vietnam.<sup>211</sup> This is partly because there is a "general sense that in-house counsel in the [United States] have a more prominent role in the affairs for the company and a higher status than outside the [United States]."<sup>212</sup> Although there may be some "teaching" needed at first, eventually their global-business associates "see [them] as executive[s] . . . who also happen to be lawyers."<sup>213</sup>

C. CFOs May Usurp General Counsel's Control over Outsourced  
Legal Work

Depending on the relationship and reporting structure between the CFO and General Counsel, the CFO may usurp some of the General Counsel's power over what legal work is outsourced and to which firms by allowing an MDP the CFO uses (for other services) to perform legal work. In essence, the CFO may bypass the General Counsel's role in the decision to outsource certain legal work. This may happen in two different ways: 1) Scope-Creep<sup>214</sup>; or 2) Direct Usurpation of General Counsel's Power.

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211. General Counsel Interviews, *supra* note 9. There are two exceptions to this. AnonymousJ has not established a non-legal, business role internationally because he works for a U.S. subsidiary of nine Japanese trading companies. He explained that "in Japan, even outside lawyers are never allowed to be involved in business negotiations. The role is very narrowly and tightly defined." The other exception is AnonymousF, who found it different:

I had to teach global counterparts what his role is. International business people say to me: "well, you are not really a lawyer, how can a person function like you do and get the attorney-client privilege?" And I responded by saying: "when it matters, I get a real lawyer like outside counsel, advice from unambiguously lawyers [sic]."

Telephone Interview with AnonymousF, *supra* note 9.

212. Telephone Interview with AnonymousM, *supra* note 9; General Counsel Interviews, *supra* note 9.

213. Telephone Interviews with AnonymousJJ and AnonymousT, *supra* note 9.

214. The term scope-creep (in the world of professional services) sometimes means that the client continues to ask for additional services that are not part of the contract. Used this way, it is a danger for the service provider, not the client. The author is using this term in a slightly different way. Here scope-

1) Scope-Creep

Given that the CFO is currently the key “buyer” of services from a PSF<sup>215</sup> and the lines between legal and non-legal work are blurry,<sup>216</sup> once legal-services become part of a PSF’s (or MDP’s) offering, there is the potential for scope-creep. In a recent article, Carol A. Needham explained this scenario as follows:

When clients are focusing on obtaining a workable solution for what has been defined as a ‘business issue’, they may not realize that legal work has been provided to them. Quite a bit of legal work is now delivered to CFOs and other businesspersons, rather than to General Counsel. When the person receiving the advice . . . does not have legal training, she is more likely to focus on the problem and alternative solutions, rather than trying to analyze whether legal work has contributed to the work product she has received.<sup>217</sup>

Not only will the team members not recognize that legal service is involved, the MDP might not highlight it. For this reason, my contact at E&Y believed scope-creep was “likely.” He explained that E&Y would not go to the General Counsel to pitch legal services if it was ancillary to the project, such as an M&A

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creep refers to when the PSF/MDP sells in services that are outside or ancillary to the scope of the original project.

215. The following sources confirmed that, most of the time, the decision to hire a PSF rests with the CFO (and sometimes the CEO): General Counsel Interviews, *supra* note 9, Interview with AnonymousW, *supra* note 9, and Interview with AnonymousE, *supra* note 10.

216. See, e.g., Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 281 (noting that “the boundaries between the law and other disciplines are blurring”); Matheson & Favorite, *supra* note 2, at 581–82 (“Legal distinctions between the professions have blurred . . . the definitions and interpretations of ‘legal services’ and ‘unauthorized practice of law’ are . . . critical.”).

217. Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315, 1328 (2000). See also Telephone Interview with AnonymousE, *supra* note 10 (noting that currently his PSF is responding to a proposal from a client to evaluate outsourcing for human resources, finance, and legal and explaining that the “CFO is in charge and should be since he needs to decide what is the most cost effective way to deliver these services. It’s an economically based decision.”).

project. Furthermore, he explained that if the services were "bundled appropriately it may be hard to separate it out." For example, the CFO (probably in conjunction with the CEO) might hire an MDP for a project that is clearly focused on a part of the business other than the legal area. The project is turned over and managed by the department involved, but as the project progresses, legal analysis and expertise is needed and the MDP (because it has lawyers working with non-lawyers) simply provides the legal work/advice. The result is that the General Counsel is not only left out of the loop, but the company is not protected against risks that only an in-house, senior lawyer can identify. Even if the General Counsel is brought in later, some risks may have already been assumed and inefficiencies realized.

Despite this potential, ten of the fourteen General Counsel interviewed did not fear the risk of scope-creep. Most were comfortable with participating in the PSF/MDP selection process only if there was a significant legal aspect to the job for which the MDP was being hired.<sup>218</sup> While they acknowledged that MDPs would likely try to cross-sell their legal expertise, they felt it was simply a matter of "partnering" with other team leaders to ensure that the General Counsel was included when necessary. One General Counsel explained that the General Counsel simply has to be "clear with colleagues in the company that if any project has any legal ramifications then the legal department has to be involved in overseeing it."<sup>219</sup> Similarly, another General Counsel said he would just "sit down with the people that might be hiring the MDP, whether it's the CFO or human resources, and talk about his concerns to make clear that, [with respect to] services that were tinged with legal advice, he needed to be in the middle of that."<sup>220</sup>

Even the few General Counsel that thought scope-creep was possible did not lend much weight to it as a threat. For example, one General Counsel acknowledged that scope-creep "could happen" and that it depends on the relationships the General

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218. The issues with this stance are explored in more depth, *infra* Part III.C.1.

219. Telephone Interview with AnonymousM, *supra* note 9.

220. Telephone Interview with AnonymousJJ, *supra* note 9.

Counsel has with other business partners and the CFO.<sup>221</sup> She believed, however, that “any General Counsel worth his or her salt could figure out a way around this threat.”<sup>222</sup> In fact, only one General Counsel expressed any real discomfort with the scope-creep risk scenario. He believed it “not inconceivable” that it could happen in his company.<sup>223</sup> He said it would be “incumbent on him to be on the look out for scope-creep . . . if the MDP came in to do this and now are doing that . . . and if [the MDP folks] are ex-lawyers, be wary.”<sup>224</sup>

Importantly, two of the three PSF managers interviewed did not think scope-creep was a threat and said their companies would specifically include the General Counsel in any bid for legal services. My contact at Accenture noted that he did not think his company would try to sell all the services in one package. Instead, they would try to cross-sell the legal services separately by going to the General Counsel.<sup>225</sup> Similarly, my contact at Andersen noted that while they “position the benefit of working with Andersen as one-stop shopping,” in Europe and Asia they pitch their legal services to the General Counsel “just like any other law firm.”<sup>226</sup> Even the lone PSF manager who felt that scope-creep was a potential problem (noted above) mentioned it was “probably a control issue that [his] company would have to monitor.”<sup>227</sup> In other words, the MDPs themselves may try to combat the problem internally thus decreasing the risk to the General Counsel.

All of these responses, however, are a bit simplistic given that there is rarely any aspect of a business project does not implicate the law<sup>228</sup> and given that the distinction between legal and non-

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221. Telephone Interview with AnonymousK, *supra* note 9

222. *Id.*

223. Telephone Interview with AnonymousO, *supra* note 9.

224. *Id.*

225. Telephone Interview with AnonymousE, *supra* note 10.

226. Telephone Interview with AnonymousW, *supra* note 10.

227. Telephone Interview with AnonymousLU, *supra* note 10.

228. See, e.g., Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 5 (“There’s very little . . . that is a business function without a legal impact: the client’s legal protection is imbedded in most all company projects.”); Telephone Interview with AnonymousB and AnonymousH, *supra* note 9; Chayes &

legal issues is blurry at best.<sup>229</sup> The General Counsel interviewees do not recognize that they might not be included in the project due to an oversight. The project leaders (no matter how senior) may not realize that there is law involved. Whether it is a matter of experience, foresight, or lack of incentive, some project leaders may not see the full scope or implications of the project. This, then, provides the opening for scope-creep, and more scope-creep means more legal work is being done by an outside agency, which may help the MDP convince the client to outsource other legal work (if they can do it efficiently). Furthermore, after Enron, the idea that a client should rely on the service partner to provide protection against this sort of occurrence seems naïve and wishful. Nevertheless, General Counsel and their companies are better protected if they also look after this themselves.

## 2. Direct Usurpation of General Counsel's Power by the CFO

The second scenario that enables the General Counsel's function to be bypassed is more straightforward. In this case, the MDP pitches legal service (that may or may not be ancillary to a project) to the current buyer of their services, the CFO, who accepts and therefrom usurps the General Counsel's role. One General Counsel described the risk as follows:

Some key hiring decision may move away from the General Counsel. The people that hire accounting firms are usually the CFO. To the extent that this becomes a trend and the accounting firms also provide legal services then there... could be a diminished role for the General Counsel in hiring decisions for legal services... if those doing audit are also

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Chayes, *supra* note 40, at 281 (explaining that "even transactions that are not legally intensive or of major significance are likely to involve inside counsel" because inevitably it will involve the law and it is more efficient and effective to have early involvement of in-house counsel).

229. See, e.g., Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 281 (noting that "the boundaries between the law and other disciplines are blurring."); Matheson & Favorite, *supra* note 2, at 581-82 ("Legal distinctions between the professions have blurred... the definitions and interpretations of 'legal services' and 'unauthorized practice of law' are... critical.").

doing legal services, the General Counsel could be out of the loop unless you set up different internal procedures.<sup>230</sup>

The usurpation by the CFO can be unintentional or intentional.<sup>231</sup> The result, in any case, is a diminishing of the General Counsel's power and prestige.<sup>232</sup>

Professor Daly commented that "there were reported incidents outside the United States" of this very thing.<sup>233</sup> She said, "there is reason to worry that MDPs that provide legal services and also have audit-function leverage may successfully solicit legal work from the CFO rather than the General Counsel."<sup>234</sup> One of the General Counsel interviewees had heard of CFO usurpation of the General Counsel's role overseas. He said that he had "heard from colleagues overseas that sometimes a legal pitch that might have come from a pure law firm to the General Counsel now comes from an MDP getting in the door through auditing or tax and from the CFO who says 'these guys are cheaper why do you need the lawyers?'"<sup>235</sup>

Both of the scenarios above are more likely to occur in situations in which the General Counsel already has less power than the CFO, that is, when the General Counsel reports into the

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230. Telephone Interview with AnonymousMc, *supra* note 9.

231. *Id.* (explaining that once the PSF is hired "the CFO might try to make them the lawyers").

232. See Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 271 ("To the extent that a CFO assumes a purchasing agent function for legal services, the General Counsel's power and prestige is likely to suffer.").

233. *Id.* at 284.

234. *Id.* (discussing the "intense and complex relationship" that exists between a PSF that does audit work and the CFO, and highlighting the important information and "exposure to management personnel" a PSF gains from being on-site, which enables the PSF to sell in legal work to the CFO).

235. Telephone Interview with AnonymousO, *supra* note 9. AnonymousO mentioned this risk without any prompting on the author's part. AnonymousMc expressed thoughts that were similar to AnonymousO's thoughts. "In a bet the bank case, for example, something with enormous discovery requests, it may well be the thing you'd want to go to an MDP for because they are number crunchers and can organize . . . Once hired, the CFO might try to make them the lawyers . . . depends on the relationship with the CFO." Telephone Interview with AnonymousMc, *supra* note 9.

CFO, which has been happening more often lately.<sup>236</sup> One General Counsel commented on this trend:

In a lot of companies, the General Counsel reports to the CFO or COO. So to the extent that the MDP is adopted and used, it could contribute to eroding a close relationship with the CEO . . . to the extent that the CFO is a buffer it makes it harder to carry out obligations of ethics rules, [and this would be a] "negative development."<sup>237</sup>

Ms. Elizabeth Wall commented that in the UK, where the CFO is more important than the General Counsel, "there is greater opportunity than there might otherwise be for financial/consulting service providers to gain access to major corporate projects, bypassing the involvement of the in-house corporate law function."<sup>238</sup>

In addition to diminishing the General Counsel's sphere of influence, the issue with this risk is that it leaves a legal decision in the hands of the CFO who, as one General Counsel put it, "would have no perspective on the legal issues."<sup>239</sup> Moreover, the CFO may make the based on costs and not accord enough weight to other factors such as professionalism, quality, and experience.<sup>240</sup> As the General Counsel of a large

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236. Telephone Interview with AnonymousH, *supra* note 9. Only one of the fourteen interviewees reported to a CFO, and this CFO was also the CEO.

237. Telephone Interview with AnonymousF, *supra* note 9.

238. Wall Testimony, *supra* note 8.

239. Telephone Interview with AnonymousD, *supra* note 9.

240. See Roster, ACCA Remarks, *supra* note 3, at 18 ("If MDPs flourish in the U.S. then [in-house counsel] will lose control of the legal business involving their corporation. The control will be centered more in the CFO's office, which will be looking at the budgets and reducing legal costs, and so on.") (statement of Mr. Simmons, Chair of the ABA Commission on Multidisciplinary Practice, and Partner at Steel, Hector & Davis); Telephone Interview with AnonymousY, *supra* note 9 ("If it all becomes a cost thing then its hard for law to raise its voice and get heard."); Telephone Interview with AnonymousF, *supra* note 9 ("The CFO is bottom line oriented and [focused on] getting the deal done."); Telephone Interview with AnonymousD, *supra* note 9. Note that this may be an unfair characterization of CFOs since they too are considered senior strategic leaders; however, much of the author's research indicated that CFOs focused, to a detriment, on budgets and costs).



telecommunications company explained, "the finance people see it all translated to numbers and that's important but not the only element in determining what sort of relationship you need to have with the MDP or what resources you need internally or externally . . . it's much more complex in servicing the needs of the business."<sup>241</sup> Similarly, one General Counsel stated that selling legal work to the CFO and bypassing the General Counsel "forebodes the idea of law as a commodity—one of the other things you get off the shelf."<sup>242</sup>

Whether the loss of control over outsourcing of legal work is due to scope-creep or reporting structure, when CFOs have control of the make-buy decision, they also have control over which service firms are terminated. Without the power to terminate the relationship, the General Counsel is left toothless in negotiations. As the Executive Vice President, General Counsel, and Secretary of a large bank in California explained, it would then be a political nightmare if the General Counsel were dissatisfied with the legal-service provided by the MDP.<sup>243</sup> "If a law firm was providing poor service, [the General Counsel] could simply fire the firm without approvals from anyone, but [in this situation] [the General Counsel] would have to convince the CFO to fire the lawyer in question and then the MDP that is working on other aspects of the project would still be kept on board." This creates tension internally—between senior managers—and externally—between the client and the service provider. Finally, with diminished power and prestige comes a decrease in

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241. Telephone Interview with AnonymousL, *supra* note 9.

242. Telephone Interview with AnonymousH, *supra* note 9. This is not to say, however, that General Counsel are not open to using MDPs because they are when it makes sense. Twelve of the fourteen General Counsel interviewed thought MDPs were a good idea and would be willing to use them for the work that they outsource. According to AnonymousH and the other General Counsel interviewed, General Counsel "will gravitate towards hiring MDPs if they are a better service provider. In-house counsel have no incentive to try to keep others out of the legal service. They want the best possible services at the best possible price. Moreover, they are more likely than other lawyers to hire an MDP since working cooperatively with other non-legal professionals is not foreign to them." Telephone Interview with AnonymousH, *supra* note 9; General Counsel Interviews, *supra* note 9.

243. Telephone Interview with AnonymousMc, *supra* note 9.

"political clout," making it more difficult for the General Counsel to carry out other important responsibilities, such as acting as the company conscience.<sup>244</sup>

The reality of the risk, however, General Counsel depends in part on the relationship between the General Counsel and the CFO and the corporate culture in which they work.<sup>245</sup> Most of the General Counsel interviewees felt the risk would be slight if the General Counsel and CFO "work closely together" and have a "harmonious relationship regardless of the reporting structure."<sup>246</sup> The only General Counsel interviewed that reported to a CFO believed that "in a well functioning company where finance and legal are in good communication and hold themselves in good respect, it shouldn't matter because financial people should recognize that legal people have unique insight into what the company needs and who is best to supply it."<sup>247</sup> Interestingly, all the General Counsel interviewees (including the one that reported to the CFO) felt their relationship with the CFO was "harmonious." Therefore, most did fear the risk of the CFO usurping their position in the company.<sup>248</sup> Ten of the fourteen

244. Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 284.

245. Telephone Interview with AnonymousMc, *supra* note 9 (when describing the risk, he said it "depends on the relationship with the CFO").

I don't think the CFO will take over. We are more likely to see the General Counsel working in partnership with the CFO and agreeing on whom to retain; and the General Counsel will supervise the legal aspects and the CFO the other stuff. You might get an exception in some situations where there was not a partnership between the CFO and General Counsel.

Telephone Interview with AnonymousM, *supra* note 9. AnonymousY stated: "[w]hether it will happen depends on the company and how hard a line the CFO will take." Telephone Interview with AnonymousY, *supra* note 9.

246. Telephone Interview with AnonymousL, *supra* note 9; General Counsel Interviews, *supra* note 9.

247. Telephone Interview with AnonymousT, *supra* note 9. This CFO was also the CEO of the company.

248. It was almost as if the idea that there could be anything but a harmonious relationship between them and their CFO was unthinkable. As AnonymousL put it, "it would not serve the interest of the company if there is a jousting between the CFO and General Counsel as to whom would have the key relationship with the MDP. It is far better for every General Counsel to forge a close relationship/alliance with the CFO." Telephone Interview with AnonymousL, *supra* note 9.

interviewees, however, acknowledged that the risk might exist for General Counsel in other companies where the relationship was not as strong or a different reporting structure existed. They believed they had a mutual relationship with the CFO and that their “expertise”<sup>249</sup> and “unique insight”<sup>250</sup> would protect them against CFO usurpation. It is unclear, however, whether this protection will be enough. Although there may not be a power struggle between the General Counsel and CFO now, the General Counsel interviewees fail to take into account that there may be in the future—especially if the CFO takes on the MDP Quarterback role (instead of the General Counsel). Once in charge, the CFOs could seek to outsource legal work and justify it based on costs. The risk is dulled if the relationship is sound; however, if the relationship goes sour, it could put the General Counsel’s role at risk. Simply understanding the importance of the relationship between the General Counsel and the CFO may help focus the General Counsel on maintaining it and thereby help stave off the risk.

D. General Counsel’s Power May Be Decreased Due to General Counsel’s Failure To Prepare for MDPs

The greatest risk General Counsel face if MDPs are introduced is the nonchalance with which General Counsel contemplate the impact that MDPs may have on their role. Although the risk is somewhat attenuated today given the current outlook on MDPs, when this research was conducted, MDPs were imminent. Indeed, many of the General Counsel interviewees believed MDPs were inevitable. In fact, twelve of the fourteen interviewees stated that if MDPs arrive, they would consider using them for the legal work that they outsource. Despite this, General Counsel were not preparing for the introduction of MDPs. They were ignoring Gilson and Sabel’s proposition that what happens in the marketplace inevitably affects the legal

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249. Telephone Interview with Anonymous], *supra* note 9.

250. Telephone Interview with AnonymousT, *supra* note 9.

profession.<sup>251</sup> They were ignoring that the legal profession's "identity within the larger realm of the professional services market is sure to change" if MDPs are introduced into the marketplace regardless of whether the legal profession is independent.<sup>252</sup>

Given that General Counsel are known as leaders of change in the legal profession, I assumed that they would be preparing for the impact that MDPs might have on their clients' businesses and their own positions. I assumed that General Counsel (of all lawyers) would be particularly well attuned to how changes in the marketplace and competition can affect their client's needs and organization structure. After all, changes in the marketplace, such as increased government regulation, altered the clients' needs and helped create the very role of in-house counsel back in the 1970s. This change to clients' organizational structure lessened the role played by outside counsel.<sup>253</sup> Therefore, I assumed that General Counsel would be proactively working with their clients to prepare for the potential changes and looking for ways to take advantage of the new landscape. I also assumed that I would find some secondary research on the subject of how MDPs might affect General Counsel's careers and that my questions on the subject would not seem so "out of left field" to the General Counsel. I was wrong about all of this.

I did not uncover any research that argued for an enhanced role for General Counsel in the MDP world.<sup>254</sup> There were very

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251. See Ronald Gilson & Charles Sabel, *The Organization of Law Firms and the Organization of Industry*, Class Materials for Professional Service Firms in the 21<sup>st</sup> Century, at 92-96 (taught by David Wilkins and Elizabeth Chambliss).

252. Matheson & Favorite, *supra* note 2, at 607 ("Regardless of whether lawyers are currently 'isolated' or 'independent,' their identity within the larger realm of the professional service market is sure to change. Economic forces much larger than the legal community are not prepared to halt because of the model rules.").

253. See discussion, *supra* Part II.A.1.

254. It appeared that the only people that shared the author's theories were Professor David Wilkins and Susan Hackett. The only possible exception to this statement may be found in Ms. Wall's testimony before the Multidisciplinary Practice Commission. See Wall Testimony, *supra* note 8. She emphasized the importance of in-house lawyer involvement when MDPs are hired. She gave an example of how an international MDP had included legal

few sources on the subject of General Counsel and MDPs and those that did exist focused more on the risks than on any potential benefits.<sup>255</sup> Despite the focus on the potentially negative impact MDPs might have on the role of General Counsel and in-house legal departments, only one source addressed the topic of how General Counsel might prepare for MDPs, and even that source sidestepped the topic.<sup>256</sup> During "The Implications of Multidisciplinary Practice on In-House Counsel" program session that took place at ACCA's 1999 Annual Meeting, Mr. Michael Roster asked the following question: "How do we structure the role of the in-house department if MDPs are very effective? . . . What is the role of the General Counsel and the in-house team in doing that, and in getting ahead of the curve, not just following

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advice in a service project without notice to the client. The in-house lawyer was the one who noticed it and prevented the client from breaching a non-disclosure agreement. She concluded that "[a]n in-house lawyer's challenge is to get involved in the transaction soon enough so that the best and the most efficient legal advice can be used." *Id.* This may perhaps be construed as an enhanced role for General Counsel in the sense that General Counsel would be involved earlier in a project. However, it was not clear that Ms. Wall felt that General Counsel should be involved in MDP projects that they currently are not involved in at all. Therefore, it is hard to consider this as a source that argues for an enhanced role for General Counsel.

255. See, e.g., Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 284 (explaining that there is a risk that MDPs will sell legal service through the CFO and that this results in less power and prestige of the General Counsel); Wall Testimony, *supra* note 8 (pointing out the risk of "bypassing the involvement of the corporate law function" in the UK "where the CFO is more important than the General Counsel"). Although most of the discussion of the effect MDPs may have on in-house law departments centered on the negative repercussions, one person at ACCA's 1999 Annual Meeting in San Diego, talked about a possible positive effect. Mr. Alberto Terol, Managing Partner of the Tax, Legal, and Business Advisory Practice at Arthur Andersen, and CEO of Andersen Legal, Garrigues & Andersen said that MDPs might have a positive effect on in-house law departments. "I tend to believe [in-house law departments] would benefit from MDPs. You would have a counterpart in an organization who is a lawyer who understand broader business issues and can bring other resources on board as needed." Roster, ACCA Remarks *supra* note 3, at 16.

256. See Roster, ACCA Remarks, *supra* note 3, at 17. The author did, however, find an article in September 2002 that had been written in Spring 2001 (after the author conducted the interviews) that called for lawyers to prepare for the introduction of MDPs. See Matheson & Favorite, *supra* note 2, at 578.

along?"<sup>257</sup> The audience, however, did not answer the question. Instead, one audience member said in response that the role of the General Counsel and in-house department would not change. Other audience members (including someone who had been a General Counsel for twelve years) focused the discussion on the risks MDPs may pose to the role of General Counsel.<sup>258</sup>

In keeping with this, none of the General Counsel interviewed perceived MDPs as an opportunity. Most did not believe their jobs were at risk (as noted earlier). In fact, most did not see the introduction of MDPs in the United States as affecting them at all. When I started my interviews by explaining that the purpose of my project was to determine the effect that MDPs might have on the role of General Counsel, most of the interviewees seemed dumbfounded. Although a few mentioned some of the risks (and explained they did not feel they were a big threat), most General Counsel interviewees did not have an answer. Either they did not think there would be much change or they had not before even considered it.

When I outlined the risks I had uncovered in my research, the General Counsel downplayed them (as mentioned above). They felt their departments were already efficient. They felt their relationships with the CFO and other business partners were strong, and that there was no need for them to be involved in MDP service projects until there was a legal aspect. They relied on the ideas of partnership and open communication to ensure that the General Counsel would be included when a service project had a legal ramification. They assumed their business partners would be able to recognize when there is indeed a legal aspect to the service project. In short, they did not feel the need to step forward in any way to "get ahead of the curve."<sup>259</sup> Only one General Counsel interviewee mentioned any proactive steps he would take.<sup>260</sup>

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257. Roster, ACCA Remarks, *supra* note 3, at 17.

258. *See id.*

259. *See id.*

260. Telephone Interview with AnonymousJJ, *supra* note 9. Concerning scope-creep, he said he would discuss his concerns with his partners and "walk them through some definitions and procedures" to help them determining what is law and when the legal department should be involved.

In addition to downplaying the risks, the General Counsel interviewed seemed to do exactly what the Enron professionals did—they narrowly defined their role. When I presented the idea that the influx of MDPs into the U.S. marketplace could be an opportunity for the General Counsel to expand their position within the companies where they work, almost none of the General Counsel interviewed understood the idea intuitively. Out of the fourteen interviewees, only five were immediately enthusiastic.<sup>261</sup> Only one of the five had previously thought about the potential a world of MDPs might bring for General Counsel.<sup>262</sup> This General Counsel had a vision. She explained, “as they have revamped legal services in the law community, General Counsel can also impact the way MDP service is delivered to the New World.”

The rest of the interviewees were a bit more reluctant and agreed with my hypothesis only after I had explained persuasively why General Counsel were uniquely positioned to fill the MDP Quarterback position.<sup>263</sup> Some General Counsel simply did not see a great need for an MDP Quarterback to oversee all service provider agreements. Some felt that the role

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261. The five interviewees were: AnonymousH, AnonymousT, AnonymousR, AnonymousB, and AnonymousK. AnonymousT jumped very quickly into the discussion and said he thought “it makes a lot of sense for General Counsel to be a shepherd of the process” and “it makes a lot of sense for General Counsel to market themselves” into this role “even if lawyers are not involved” in the particular project. However, he added a caveat and said it would not make sense in his job as the General Counsel in his company to do this. AnonymousR also agreed quickly with the author’s hypothesis but said “other managers could do it just as well.” AnonymousB believed “MDPs may pose an opportunity for General Counsel to exploit.” AnonymousK agreed quickly and said she could “very easily see this happening.” She said the introduction of MDPs would be “easier if the company uses MDPs in a way that will naturally include General Counsel.” She explained that the General Counsel is “going to be there if MDPs are invited. If the only way you can make sure you have a hand in the legal advice that comes in through the MDP is to control the flow of work (*i.e.*, take on this new role), then that is what you need to do.” General Counsel Interviews, *supra* note 9.

262. AnonymousH may be the only one to have such a positive vision because her job is to promote attorneys.

263. The General Counsel responses are discussed in more detail below.

was dependent on the culture and size of the company.<sup>264</sup> Others did not think any one person should be determining their company's MDP needs.<sup>265</sup> Instead, they felt the people whose business units were directly affected should be the ones involved in each PSF/MDP hiring decision and on the project task force. They felt that each department needed to make its own decision about who was leading the project and that the onus was on that department to include others. They explained that it came down to politics and forming solid relationships with the other executive managers (*e.g.*, the CEO, CFO, director of marketing, and HR) to ensure that the General Counsel would be involved when necessary.<sup>266</sup>

Even those that saw a need for an MDP Quarterback did not readily feel that the General Counsel should fill this role. While they accepted that it could be them (after hearing the reasons why I thus believed), it did not feel like a natural fit to them, which was surprising given the multifaceted nature of a General Counsel's job. As mentioned, most of the General Counsel interviewed had experience managing non-law departments and participating at the business table as more than just legal advisors. For some reason, however, they resisted the idea of the General Counsel filling the role I described.<sup>267</sup> Unsurprisingly, the non-attorneys interviewed also resisted the idea. Both the General Counsel and non-attorney interviewees felt that someone else (like the CEO or CFO) would fill the job if it indeed needed to

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264. Telephone Interview with AnonymousT, *supra* note 9.

265. *E.g.*, Telephone Interview with AnonymousL, *supra* note 9 ("You need to have a harmonious relationship . . . you don't need to have one individual or one leader controlling the company's relationships with one or more MDPs.").

266. The issues with this stance will be explored, *infra* Parts IV.A. and IV.C.

267. Perhaps the author was not clear enough that the MDP Quarterback would not be *telling* the hiring department that they didn't need to or could not hire a marketing consultant to help them. She did not envision that the Quarterback would be controlling and directing the actual activities of the MDPs. Perhaps she would have found more head-nods if she had described the role as a gatekeeper versus Quarterback. However, that hypothesis is antithetical to her other findings showing that General Counsel are already cross-functional leaders at the companies for which they work. It does not make sense for them to shy away from leadership given the high level of decision-making they practice in their current positions.



be filled. One General Counsel explained his discomfort with the General Counsel in the role as follows: it would be “the tail-wagging the dog.”<sup>268</sup> He did not think the General Counsel should play such a role “if the legal aspect [of the project] is small.”<sup>269</sup> Moreover, he did not see why the General Counsel should be the Quarterback versus other senior business managers.<sup>270</sup> Perhaps he did not see these things because, ultimately, he did not believe that General Counsel could protect the company from the risks MDPs pose, or because he did not believe that the MDPs posed significant risks.<sup>271</sup> Although this General Counsel spends more than 50% of his time focusing on non-legal work, he felt the argument was “more persuasive with . . . smaller companies where the General Counsel is more deeply embedded in all the aspects of the business.”<sup>272</sup> Another General Counsel expressed a similar view—that the role was more appropriate for a General Counsel of a smaller company, like his own, where he believes General Counsel wear more hats.<sup>273</sup> This view is odd for many reasons. First, it contradicts the view that a smaller company has less need for an MDP Quarterback. Second, all of the General Counsel (including these two) had diverse responsibilities and most were “embedded in all the aspects of the business.” Lastly, my research shows that General Counsel at smaller companies do not necessarily wear more hats than at larger companies.<sup>274</sup> The most disturbing

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268. Telephone Interview with AnonymousMc, *supra* note 9.

269. *Id.*

270. *Id.*

271. *Id.* (“I’ve been a General Counsel for 20 years and have never invoked the attorney-client privilege.”).

272. *Id.*

273. This contradicts other respondents who claim the role is less viable at smaller companies since there is less usage of MDPs and less opportunity for overlap of issues.

274. The author’s research shows that most General Counsel have a broad range of responsibilities and do a mixture of legal and non-legal work and that the size of the company does not dictate the mix. General Counsel Interviews, *supra* note 9; Daly, *The Role of the General Counsel*, *supra* note 7, at 1080. In addition, the author’s research did not show that the size of the law department dictated the mix of work either. General Counsel of larger departments did not consistently spend more time on legal work than General Counsel of smaller

aspect of this is that many of the General Counsel interviewed (who already wear many hats) did not feel that they should add the MDP Quarterback helmet to their wardrobe. Even those few that heartily agreed with my hypothesis expressed the belief that "other managers could do it just as well."<sup>275</sup>

This nonchalance and reluctance to broaden their role—besides being antithetical to the historically proactive character of General Counsel—and prepare for the introduction of MDPs is the biggest risk of all. Just as it is "both naïve and self-destructive for the legal profession to expect to remain untouched by the structural and technological upheavals that . . . have reordered the financial industrial markets and redrawn the worlds geopolitical map," it is "both naïve and self-destructive" for the General Counsel specifically to "expect to remain untouched" by the introduction of MDPs into the marketplace.<sup>276</sup> By not acting, by wearing blindfolds, General Counsel are creating the risks identified in this Article. As explained, all of the risks can be halted with preparation. If outsourcing is even a remote risk, General Counsel can and should combat it by ensuring their department is efficient. If scope-creep or direct usurpation by the CFO is a possibility, General Counsel can focus on the relationship. Risks are generated when they simply assume that the legal department is efficient enough or the relationship between the CFO and General Counsel is solid, or that the CFO will want to include, or even know when to include, the General Counsel. General Counsel "must properly prepare their entrance

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departments. *But see* Hackett, *The Future of In-House Law Dep'ts*, *supra* note 15, at 3 (noting that "the department's size determines much about the way that a corporate counsel spends her day"). The author's study also pointed out that the legal/non-legal work mix can change within the same company/same department because the company's needs can change. In sum, the responsibilities of the General Counsel seem to be dependent on the company's needs and culture rather than the size of company or the in-house legal department.

275. Telephone Interview with AnonymousR, *supra* note 9.

276. Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 281.

into the professional marketplace, or fail to notice their exit from the same."<sup>277</sup>

The General Counsel completely ignore the impact that their failure to fill this new MDP Quarterback role—and someone else filling that role—might have on their current position. By not taking this opportunity, General Counsel leave another senior executive the opportunity to fill this new Quarterback role. The CFO is a likely candidate. This is because hiring service partners greatly affects the bottom line (something CFOs care a great deal about) and the CFO is currently the primary buyer of services from the Big 4 (potential MDP leaders).

Even if no one else fills this position and none of the risks mentioned occur, by ignoring the “what ifs,” the General Counsel lose out. This is because General Counsel are passing up an opportunity to add value for their clients, enhance their power and influence in the company, and effect change in the legal services market. As noted earlier, General Counsel are known for their “change-agent” abilities.<sup>278</sup> If a General Counsel were to begin to build this enhanced role for himself or herself now, it would be viewed as proactive. Moreover, the MDP Quarterback role would provide increased exposure to the company’s core business issues, thus making the General Counsel a more well-rounded top executive, more knowledgeable about the client’s business, more valuable, and hence more influential. In addition, it could have a major impact on how MDPs provide service to their companies and how the legal profession provides legal service within that context. By taking such proactive steps, General Counsel would safeguard against the core values of the profession (confidentiality, independence of judgment, and conflicts of interest) and at the same time influence how MDPs offer legal service—*i.e.*, the way it is sold-in to clients, explicated in service agreements, and is performed. In sum, General Counsel are passing up the opportunity to revolutionize the way legal services are provided in the future.

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277. Matheson & Favorite, *supra* note 2, at 607. This was stated in reference to the legal profession in general, therefore, arguably it applies to General Counsel as well.

278. See discussion, *supra* Part II.A.2.

## IV. RECOMMENDATIONS AND CONCLUSIONS

Although my research indicates that the risks to General Counsel are not great, recommending that General Counsel take steps to safeguard against the potential risks seems wise in the wake of Enron and September 11. Moreover, some preemptive preparation is not inefficient. All of the steps General Counsel can take to safeguard against the potential risks outlined in this Article are beneficial in their own right. As one General Counsel put it, "any law department becomes complacent at its peril."<sup>279</sup> Therefore, even those General Counsel that feel their positions are secure should consider doing some things now to prepare for the changes MDPs may bring.<sup>280</sup> Moreover, even if MDPs are never introduced into the United States, General Counsel should consider making themselves the PSF Quarterback for their companies. The Enron debacle proved that there are many risks involved when working with a PSF, and it is important to have someone in management overseeing conflicts of interest. To that end, based on my primary and secondary research, there are three recommendations General Counsel should consider.

A. Enhance the Relationship with the CFO

Although many of the interviewees claimed they had solid relationships with their CFO and were on even footing with them, relationships can change with changes in the marketplace. As one General Counsel explained, CFOs (in other companies) are already trying to convince senior management to have the in-house legal department report to them.<sup>281</sup> They are claiming that General Counsel and their attorneys are "too contentious" and that their "skill set is never going to be expandable."<sup>282</sup> Another reason to focus on building a better relationship with the CFO is

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279. Telephone Interview with AnonymousB, *supra* note 9.

280. See, e.g., Matheson & Favorite, *supra* note 2, at 578 (calling out to the legal profession in general to take "steps" "now to ensure that MDPs are created, and operated, within a framework that respects the dual nature of the profession").

281. Telephone Interview with AnonymousR, *supra* note 9.

282. *Id.*

simply that all relationships (business or personal) can benefit from some attention and relationship building exercises. Spending some time on the relationship may enable the General Counsel to convince the CFO to see a situation from his/her perspective and General Counsel "demonstrate" that in-house attorneys are not "just saying no and treating every item as only a legal issue."<sup>283</sup> Sometimes it's a matter of communication. The General Counsel and CFO in some ways speak different languages. To that end, although many General Counsel already know how to read financials and are great at learning by doing, General Counsel might want to consider taking some financial classes.<sup>284</sup> This will help General Counsel better understand the vantage point of the CFO, be more credible in non-legal areas of the business, and "speak [the CFO's] language" so they can "sell what [they] are doing."<sup>285</sup>

B. Educate Clients Now About the Issues and Risks Involved with MDPs

This recommendation is about preventing the easy mistakes. Sometimes just being aware of a potential problem is enough to prevent it from happening. As one of the General Counsel interviewees put it, even those General Counsel who have solid relationships with their CFO and other department heads should "sit down with the people that might be hiring the MDP [*i.e.*, the CFO, CEO or other Senior Manger]... to talk about the

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283. *Id.*

284. Research shows that many General Counsel feel that taking finance classes may prove helpful in their job. A study of corporate counsel in Canada done by Professor Sally Gunz supports this recommendation: 53% of in-house counsel said they wished they had financial/accounting or business management training. See Samuelson, *supra* note 7, at 342 (reporting findings from Professor Gunz's study).

285. Telephone Interview with AnonymousO, *supra* note 9. Three of the eight General Counsel who provided recommendations for protecting against the risks of MDPs specifically advocated that General Counsel take some finance classes: AnonymousL, AnonymousO and AnonymousM. Due to timing constraints, the author was not able to ask all of the General Counsel interviewees for recommendations.

concerns," discuss the potential for scope-creep, the risks involved with it, and the "procedures" for preventing it. Once the other managers understand why the General Counsel is concerned about it, they may be more cognizant of it. Additionally, the General Counsel should ask to be more involved in the current PSF hiring decisions than they already are, in order to gain more exposure to the process before the professional firms become MDPs and offer legal services.<sup>286</sup>

### C. Market Themselves Internally To Their Clients

Part of a General Counsel's job is to market the functions of the legal department internally to the client.<sup>287</sup> John McGuckin, Jr. wrote in his article *Marketing In-House Counsel To In-House Clients* that General Counsel need to market themselves "to create and reinforce [their] self-image" and educate clients when and how to use the department, and establish himself or herself as a problem solver because employees have "misconceptions about how and when the legal department should be used based on their experience in prior companies."<sup>288</sup> If MDPs happen, internal marketing is going to be even more crucial. First, General Counsel may have to show how their staffs compete in quality and cost.<sup>289</sup> Even in a world without MDPs, the "future and status" of legal departments depends on what "legal department[s] can do for the company."<sup>290</sup> An MDP world will, without doubt, also be a "what-have-you-done-for-me-lately"

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286. As noted earlier, seven of the General Counsel interviewees have been or are currently involved in the PSF selection process.

287. See generally John McGuckin, Jr., *Marketing In-House Counsel to In-House Clients*, 760 PRACTISING LAW INST., CORPORATE LAW PLI, ORDER NO. B4-6986, at 433 (Dec. 1991-Jan. 1992).

288. *Id.* at 436-37.

289. Hirsch, *supra* note 50, at 16-17 (concluding that "in-house attorneys are not immune from the hard economic realities of the 1990's" and "[t]hey must compete effectively with outside counsel as to both quality and cost"). Arguably, they will also have to compete with MDPs.

290. McGuckin, *supra* note 287, at 437.

world.<sup>291</sup> The way to prevent being “marginalized” is to provide “unique service.”<sup>292</sup>

Internal marketing will help reduce the risks; however, it is obvious from my research that more than this will need to be done for the introduction of MDPs to be turned into an opportunity for General Counsel. This new position as MDP Quarterback is not just going to fall in the General Counsel’s lap; it will have to be actively leveraged by General Counsel. General Counsel may be respected as having as much business acumen as that of other senior managers; however, my research indicates that something holds them back from slipping on this new and different role. Since being the MDP Quarterback is not an easy sell to the General Counsel themselves, odds are it is going to be an even harder sell to their non-legal peers. In other words, just because General Counsel could be the new Quarterback does not mean they will be. Therefore, in order to be the Quarterback of tomorrow’s MDP world, General Counsel must market themselves (now) to their employers and PSF/MDP professionals as the right person for that job.

To that end, those that want to do more than prevent the risks, those that want to leverage MDPs into an opportunity for role enhancement, should consider putting together a presentation for senior management now about the risks MDPs pose, the benefits of an MDP Quarterback, and why the General Counsel is the best person to fill that role. As noted above, even if General Counsel do not believe MDPs will ever happen, General Counsel should consider turning themselves into a PSF Quarterback and present to management the risks that PSFs pose and the benefits a PSF Quarterback can provide. The Sarbanes-Oxley Act could be interpreted to position General Counsel as a compliance officer.<sup>293</sup> One purpose of the law is to make sure that the PSFs a company hires do not present conflicts of interest. The MDP—or PSF—Quarterback role is in keeping with that. The

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291. *Id.* (arguing that the “future and status” will also depend on “what the department has done for me lately” in terms of helping the company, budgets).

292. Telephone Interview with AnonymousT, *supra* note 9.

293. Both the Sarbanes Bill and the Oxley Bill contained provisions focused on the role of lawyers. See Villa, *supra* note 5, at 5.

Sarbanes-Oxley Act is calling out for companies to be vigilant with how they manage internal ethics and external relationships. Corporate-related professional associations, like The Business Roundtable, have done the same, calling out for companies, on their own, to enact best practices in corporate governance.<sup>294</sup> In fact, since Enron, "some legal academics have called for significant changes to the laws that govern attorneys" as well.<sup>295</sup> Developing an MDP or PSF Quarterback role is a way to answer that call so that the profession's independence and ideal of self-regulation is protected<sup>296</sup>—*i.e.*, implementing an MDP Quarterback role may help prevent regulation by external bodies.<sup>297</sup> It is also a beneficial way of dealing with "a new environment in which, at least in the short run, corporate conduct will be viewed with suspicion."<sup>298</sup>

In essence, this is a recommendation to General Counsel to market themselves into an enhanced position. "Companies are interested in having a professional pursue their work."<sup>299</sup> In simply taking this first step, they will be, as one General Counsel interviewee pointed out, doing what General Counsel do in so many other ways and "what business people value." They will be taking their legal and business skills and "apply[ing] them in a broader context . . . [showing] they have a vision and [can] think

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294. *Id.* at 22 (noting that the guidelines of the BRT "emphasize the central role played by corporate ethics in effective corporate governance" and "urge companies to adopt a number of other best practices in corporate governance").

295. *Id.* at 25.

296. *Id.* at 4 n.6 (noting that some view the Enron debacle as failure of the "ideal of independent professions as self-regulating groups"). In response, the ABA has "established a Presidential Task Force on Corporate Responsibility that is examining the laws and regulations and ethical principles governing not only the role played by corporate officers and directors in assuring corporate integrity and responsibility, but also the role of lawyers." *Id.* at 1; *see also* Matheson & Favorite, *supra* note 2, at 578 (calling out to the legal profession in general to take "steps" "now to ensure that MDPs are created, and operated, within a framework that respects the dual nature of the profession").

297. *See, e.g.*, Matheson & Favorite, *supra* note 2, at 583 (noting that the "primary purpose of regulating lawyers is the protection of a lawyer's independent professional judgment in service to the client and the court").

298. *See* Villa, *supra* note 5, at 2.

299. Telephone Interview with AnonymousH, *supra* note 9.



strategically over the long term issues and [that they] bring practical solutions to business problems.”

Obviously, all of these recommendations and conclusions must be taken in the context within which a General Counsel works, that is, if the General Counsel works at a small company that does not use service providers very often, then the opportunity (and also the risks) posed by MDPs will be smaller. Just as it is hard to generalize about what General Counsel do (since they all do different things), it is hard to generalize about what impact MDPs will have on the market and role of General Counsel and how General Counsel can leverage the changes in the marketplace. Anything is possible. It is possible that MDPs will have no effect on the role of General Counsel. It is possible that MDPs will diminish the role of General Counsel and their legal departments. And it is possible that General Counsel can use the introduction of MDPs to enhance their position and influence. Any of these things are possible, and General Counsel, by acting or not acting, affect the probability of them occurring. My research shows that the role of General Counsel could change if MDPs are introduced into the United States. It is up to General Counsel, however, to ensure that the change is an advantageous one.

## APPENDIX

Research Methodology

Despite the importance of General Counsel within the legal profession, very little empirical research has been done on General Counsel (General Counsel).<sup>300</sup> Consequently, I found very few sources about General Counsel that were based on primary research and even less on the effect MDPs may have on General Counsel's role.<sup>301</sup> In fact, I was only able to find five sources in total that even remotely addressed the subject of how the introduction of MDPs into the United States may affect the General Counsel's role.<sup>302</sup> Therefore, I reviewed empirical

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300. Samuelson, *supra* note 7, at 337 (commenting that "despite their importance within the profession, [in-house counsel] have been the subject of little research, and most of that has been anecdotal, not empirical"); Daly, *The Role of the General Counsel*, *supra* note 7, at 1067 ("Unfortunately, scholarly writers and researchers have paid very little attention to the combined effect of the growth in number, prestige, and power of in-house counsel and the globalization of the business and capital markets . . . This is a subject that cries out for greater empirical research and scholarly analysis.").

301. Of the approximately 38 secondary sources cited in this Article, thirteen were based primarily on empirical research—*i.e.*, surveys, testimonies, or interviews with attorneys. Only four addressed the topic of the author's Article: Wall Testimony, *supra* note 8; Roster, ACCA Remarks, *supra* note 3; *Touting for Fear*, *supra* note 8; and Carr & Frederickson, *supra* note 8.

The other nine were about General Counsel or MDPs but did not address how the introduction of MDPs would affect General Counsel specifically: Chayes & Chayes, *supra* note 40; Terry Testimony, *supra* note 95; Terry, *German MDPs*, *supra* note 1; CLO Survey, *supra* note 187; 2001 Law Department Compensation Benchmarking Survey, *available at* <http://www.altmanweil.com/publications/surveys/ldcbs2000/introduction.html> (last visited Mar. 17, 2001) (on file with author); McCaffery, *The Electronic Barrister*, *supra* note 160; Linda Campillo, *supra* note 46; Carr, *supra* note 152; and Dianne Molvig, *supra* note 40.

302. The author only found five sources that addressed the effect that MDPs might have on General Counsel's role, but it was not the main topic in any of them: Daly, *Choosing Wise Men Wisely*, *supra* note 3, at 223–28; Roster, ACCA

research of other scholars and secondary sources (such as law review articles and websites) that addressed either the role of General Counsel or the introduction of MDPs in the United States and other countries. This research lent support for and helped me refine my theories. To test what I had unearthed, I conducted eighteen personal telephone interviews (averaging about one hour in length) with twelve General Counsel, one Associate General Counsel, one VP of Legal,<sup>303</sup> three Professional Service Firm Managers,<sup>304</sup> and one Chief Financial Officer.<sup>305</sup> The sample is small,<sup>306</sup> and therefore anecdotal. As other scholars have claimed in the past about similar sample sizes and methods, however, this research still “provides a useful start for an analysis”<sup>307</sup> of the effect MDPs could and should have on the role of General Counsel.

After an exploratory interview with one General Counsel, I prepared a multi-page questionnaire for my other interviewees. During the interviews, I typed the answers to the questions directly onto the questionnaire via my computer.<sup>308</sup> I organized my questionnaire as follows: I began with a short introduction to explain who I was and why I was calling. I kept the article topic very brief and general—*i.e.*, “I am doing an article on the role of

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Remarks, *supra* note 3; *Touting for Fear*, *supra* note 8; Carr & Frederickson, *supra* note 8; and Wall Testimony, *supra* note 8.

303. General Counsel Interviews, *supra* note 9. Given the depth and breadth of their experience and current roles within their respective companies, these two corporate counsel are treated in this Article as part of the General Counsel sample.

304. PSF Manager Interviews, *supra* note 10.

305. Telephone Interview with DeStefano, *supra* note 11.

306. See *supra* note 12 and accompanying text.

307. Terry, *German MDPs*, *supra* note 1, at 1589. Terry interviewed approximately thirteen attorneys and one legal ethics expert. In addition, she spoke thirteen times in Germany about MDPs and conducted question and answer sessions afterwards. *Id.*

308. See *id.* at 1588 n.185. Likewise, the author did not tape record the interviews because she feared this would put off the interviewees and make them less forthcoming. Since the author promised to send a copy of her Article to each interviewee for approval if the paper were to be published, the interviewees felt comfortable with their answers being typed during the course of the interviews.

General Counsel today and the impact the introduction of MDPs in the United States might have on their role in the companies for which they work." Before asking questions, I briefly described the order of the interview and mentioned that I would be typing as we spoke. I stated that the information would be used in an article but that anonymity would be retained if the paper was published. I divided the questionnaire into four parts ordering it so the easiest information was obtained first and a rapport could be established before moving on to my theories. In the first part of the interview, I sought background information—*i.e.*, employer, title, years of experience, law school attended and graduation date. In the second part, I probed for information about their role as General Counsel. In the third part, I explored the impressions of General Counsel by the professional community. During the last section, I focused the discussion on MDPs and their potential impact on General Counsel. Within the last section, I was careful to ask very open-ended, non-leading questions before explaining my theories in detail. Most of the interviews hovered around an hour in length but they varied from forty-five minutes to an hour and a half. Therefore, I obtained more information from some interviewees than others. Additionally, depending on the interviewee's interest, I spent more time on some sections with different interviewees. I was able to complete all of the most important questions with all of the interviewees. For the sake of time, however, I sometimes skipped over the questions concerning compensation and recommendations. I proceeded similarly with the interviews with the Professional Service Firm managers and the CFO. The questions, however, were different.

#### *The General Counsel Interview Sample*

The sample of General Counsel interviewees was not unbiased, and it had limits. While most General Counsel gave me more than an hour of their time, I was unable to ask each General Counsel all of my questions (as mentioned above). Specifically, I was only able to ask eight of the General Counsel to provide recommendations for how they would protect against the risks we discussed and eleven of the General Counsel about

compensation. Moreover, the General Counsel I contacted were either people that I had known through my past work experience or people whose names were provided to me by Susan Hackett, Senior Vice President & General Counsel of the American Corporate Counsel Association (ACCA).

The fact that the majority of the people I contacted belong to and are likely active with ACCA could have skewed the results in three ways: (1) These individuals may be more likely to be involved in protecting the reputation of the legal profession and more specifically protecting the reputation of General Counsel—*i.e.*, they may be more likely to shed a positive light on their duties, responsibilities and the viability of their future<sup>309</sup>; (2) these individuals, leaders among their own, may be more likely to be successful and powerful in their jobs and hence not provide an accurate snapshot of what the average General Counsel does; and (3) these individuals may have been chosen by Susan Hackett because she knew they had an interest in the subject matter of my project, MDPs.

An unavoidable aspect that may have skewed results is that my sample was self-selected—*i.e.*, I only interviewed those people willing to call back and give their time to someone they did not know. Perhaps only those who were very interested in the subject or only those General Counsel that felt their jobs were not at risk or only those General Counsel that felt strongly one way or the other about MDPs were willing to call me back.<sup>310</sup>

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309. It is likely that Susan Hackett only provided names of individuals who would promote the reputation of General Counsel and ACCA since it is her job to ensure that ACCA is successful.

310. Only one person the author interviewed, AnonymousY, felt that MDPs should not be allowed in the U.S. This could indicate that Susan Hackett only provided names of individuals that were pro-MDPs.

The following chart provides a brief snapshot of the sample:

DESCRIPTION ("GC" means General Counsel)	# APPLICABLE	% APPLICABLE
Successful attempted contacts by author	14	88%
Sourced from ACCA	13	93%
Previous law firm experience <sup>311</sup>	13	93%
Previous partner at a law firm	6	43%
GC at company with > 10,000 employees	6	43%
GC at company with < 10,000 > 1,000 employees	7	50%
GC at company with < 1,000 employees	2	14%
Legal department of < 4 (people)	6	43%
Legal department of > 4 < 20 (people)	1	7%
Legal department of > 20 (people)	7	50%
Report to CEO or Chairman*	13	93%
Report to CFO**	1	7%
Men	10	71%
On Senior Strategic Business Team	10	71%
Spend > 50% of Time on Non-Legal Work	9	64%
Open to Using MDPs for Legal Work	12	86%

\*The one GC interviewee, who did not report to the CEO, reported to the GC who reported to CEO.

\*\*The CFO in this instance was also the CEO.

Note: All the interviewees had the title of GC or Chief Legal Officer except two: (1) Associate GC reporting to the CEO with prior experience as a GC and 23 years of work experience; and (2) VP of Legal at a large computer company, prior partner at a large law firm and 17 years of experience. Given the depth and breadth of their experience and current roles within their respective companies, they are included within the analysis of the GC interviewee sample unless noted otherwise.

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311. All but one of the thirteen that had previous law firm experience had worked at a large law firm. General Counsel Interviews, *supra* note 9.

*The Business Professional Interview Sample*

Although this project is focused on General Counsel, I also interviewed a few managers from Professional Service Firms (PSFs) and a CFO to make sure my theories about General Counsel's future role were not unrealistic. I wanted to check to see if General Counsel's business peers saw the potential for General Counsel to take on the MDP Quarterback role. Additionally, I wanted to see if the risks I hypothesized were real. I calculated that if the risks were real, then a quick check with just a few PSF managers and a CFO would help confirm that without enlarging the scope and focus of the project.<sup>312</sup>

I interviewed a Global Managing Partner from a PSF, a Marketing Director from one of the Big Five (now Four), a Managing Director from another large PSF, and a CFO of an investment fund. All of these contacts were personal ones and had between twelve and twenty years of work experience. The CFO was a woman and the PSF managers were men.

Like the General Counsel sample, the Business Professional sample also had its limits. First, its size makes it, at best, anecdotal. Second, the fact that all of the business professionals were personal contacts may have made them agreeable towards my theories and me. Third, the contacts were not all at the same level and the PSF contacts were not even from the same types of departments. Furthermore, I do not know definitively that any of the business professionals had enough exposure to a General Counsel and to their companies overarching objectives and strategies to qualify their statements.

Another inherent bias to the research was my previous work experience and current career goals. As may be obvious from my theories, I am biased towards lawyers and General Counsel in general. I am a lawyer who left the business professional world and a career in marketing because I felt that as a lawyer I could

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312. Obviously, more research could be done with business professionals. However, the primary focus of this Article is on General Counsel. Therefore, the author only interviewed a few non-lawyer professionals in order to do a periphery crosscheck to ensure that what she heard from the General Counsel was legit.

make a difference that I could not as a non-lawyer, senior executive. Therefore, I may have tended to hear things about General Counsel's role in a more positive light than negative. Moreover, I have experience with PSFs. I have worked for a PSF and I have hired PSFs and worked with them in the role of client. This may make me especially pro-MDP and pro-MDP Quarterback.



*Notes & Observations*