

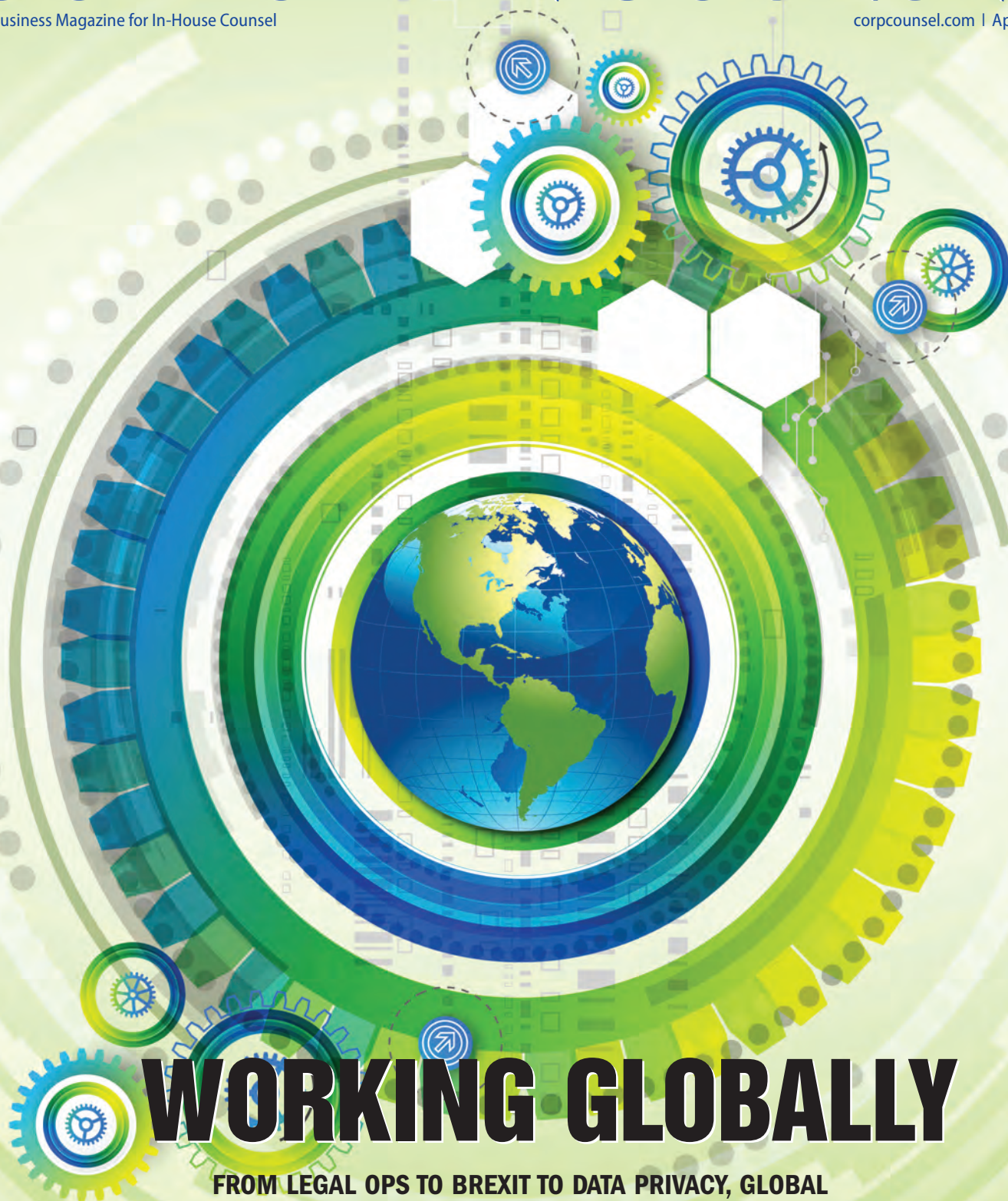
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CORPORATE COUNSEL

The Business Magazine for In-House Counsel

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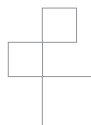
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9

contents



“The no-deal Brexit is the darkest possibility. No one’s prepared for it.” —Sheppard, Mullin, Richter & Hampton’s Reid Whitten

SPECIAL GLOBAL PACKAGE:

22 | FROM MATURE TO BURGEONING

An in-depth look at the differences in legal operations around the globe. By Dan Clark

26 | BREXIT: WHAT’S NEXT?

Legal departments brace for the “darkest possibility” of a no-deal Brexit. By Phillip Bantz

30 | PRIVACY PRIORITY

For global general counsel, the importance of international data protection laws is taking center stage. By Caroline Spiezio

34 | COMBATING CORRUPTION

Where democracy stumbles or never existed, does corruption flourish? By Sue Reisinger

36 | VENEZUELA SANCTIONS

Will new sanctions on state-owned oil company bring greater risks or new opportunities for U.S. businesses? By Phillip Bantz

38 | LEGALTECH NEWS

When it comes to legal technology, Australia is making waves. By Zach Warren



26



11

INBOX

9 | CYBERSECURITY

Twenty tips from Dennis Garcia, assistant general counsel at Microsoft.

By Dan Clark

10 | CLO V. GC

Why you may need both, according to in-house legal experts.

By Kristen Rasmussen

11 | ADVICE

Six principles to help new in-house counsel find balance within the role.

By Noel Elfant

contents



DEPARTMENTS

14 | NUMBERS

15 | REGWATCH

Scott Pink, special counsel at O'Melveny & Myers, talks about internet-connected toys, the information these toys collect and the laws that govern the space.

By Dan Clark

17 | MOVES

British global hospitality company InterContinental Hotels Group PLC has promoted its long-time executive vice president, general counsel and company secretary.



COLUMNS

42 | INDUSTRY INSIGHTS: RISK MANAGEMENT

In the context of a business, lawyers should be proactive about their risk management approach.

By Dan Sanders

44 | DATA PROTECTION

As more countries seek adequacy decisions with EU, will U.S. get left behind?

By Phillip Bantz

19 | IP INSIDER

Decades after Congress altered the Copyright Act of 1976, a musical copyright issue rises from the dead.

By Scott Graham

48 | OUTBOX

Anthony Justman, vice president and deputy GC at Sony Interactive Entertainment, talks about his management style and growth as a business leader.

By Caroline Spiezio



ALSO

6 | EDITOR'S NOTE



COVER ART BY
TIM WEBB

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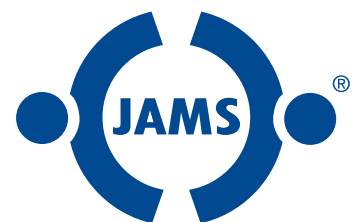
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editor's note



GLOBAL GOALS

HERE AT CORPORATE COUNSEL, WE HAVE TRADITIONALLY FOCUSED PRIMARILY on U.S. companies and their legal leadership. But in today's growing economy, many U.S. companies are looking at how to expand their footprint. Whether it is in Latin America, Europe or Asia, legal leaders tell me they want more global-focused content—especially as it applies to global expansion.

Because as we know, as companies expand globally things get more complicated. Whether it is because of law-related issues such as regulatory compliance, data privacy and GDPR, or more obtuse issues such as how to successfully manage cross-border teams, trying to navigate and utilize new technologies, or the intricacies of understanding the cultural complexities of different countries. These hard and soft skills require the legal department leader to understand a myriad of different and complex issues.

In this special issue of Corporate Counsel, we focus on some of those challenges—and discuss solutions from those who know.

In our cover story, we take a look at the differences in legal operations around the world. How do other countries utilize legal ops effectively to develop a more efficient and cost-effective legal department?

And when it comes to uncertainty, just talk to any company in the UK. The unknown effects of Brexit and how to prepare for the various possibilities that lie ahead certainly weighs heavy on the mind of in-house counsel.

Speaking of uncertainty, what about data privacy trends and regulations outside of Europe? As most of the focus so far has been on GDPR, what are the crucial changes in other regions like Latin America, Africa and Asia-Pacific?

We take a look into these issues and other topics like the booming legal tech industry in Australia, and what the sanctions in Venezuela might mean for U.S. businesses.

I hope you enjoy this issue as much as we enjoyed putting it together. Thank you for reading!

Best regards,

A handwritten signature in black ink that reads "Heather D. Nevitt".

Heather D. Nevitt
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GETTING A HANDLE ON YOUR CYBERSECURITY

 BY DAN CLARK

AS ASSISTANT GENERAL COUNSEL AT MICRO-soft, at his previous jobs at Accenture and IBM, and on social media where he's a consistent commentator on tech issues, Dennis Garcia has staked his claim as being on the forefront of emerging issues. And especially in today's data-rich environment, there are few issues as core to a technology company's business as cybersecurity and privacy.

Taking a cue from "A Tale of Two Cities," Garcia said, "It was the best of times, it was the worst of times. When I think about the technology space right now, especially in the data-driven world, I think that's an accurate summation."

So does one keep a company in the best of times rather than the worst when it comes to security? At the Feb. 11 keynote of the Association of Legal Technologists' second ctrl ALT del conference, Garcia ran down 20 factors that attorneys and legal technologists should always consider when it comes to security and privacy. If that seems like a lot, Garcia noted that it's crucial to furthering an attorney's primary value proposition: trust.

"What I think it really all comes down to at the end of the day is this notion of trust," Garcia said. "What it means for your organizations ... think about how you also build that trust in terms of your clients' data."

GARCIA'S 20 TIPS

1. Set the tone at the top: "You need to make sure your senior leaders have bought in on protecting client data."

2. Knowing when to ask for help: "It's a growing area, but it's a highly specialized area, so you need to make sure you get the right folks."



Dennis Garcia

3. Conduct security audits: "It's always great to get a third party perspective."

4. Get a better handle on what data you have: "Some quite frankly don't do a good enough job understanding the landscape of their data."

5. Put written information security policies (WISPs) in place: "There's been a tendency to cut and paste a policy from another company. ... But you need to be careful with that. Every organization is different with their scale and their size."

6. Watch for employee separation and disgruntled employees: "You want to give some thought as to ... what sort of access to information should he or she have."

7. Training, training and more training: "Think about how you deliver meaningful training to your employees. ... When you do this training, make sure you keep it current."

8. Institute Transparency: "Think about how you can be very clear to your

clients and customers to the steps you're taking. ... I think we'd rather work with a technology provider that overcommunicates what they're doing in this space than undercommunicates."

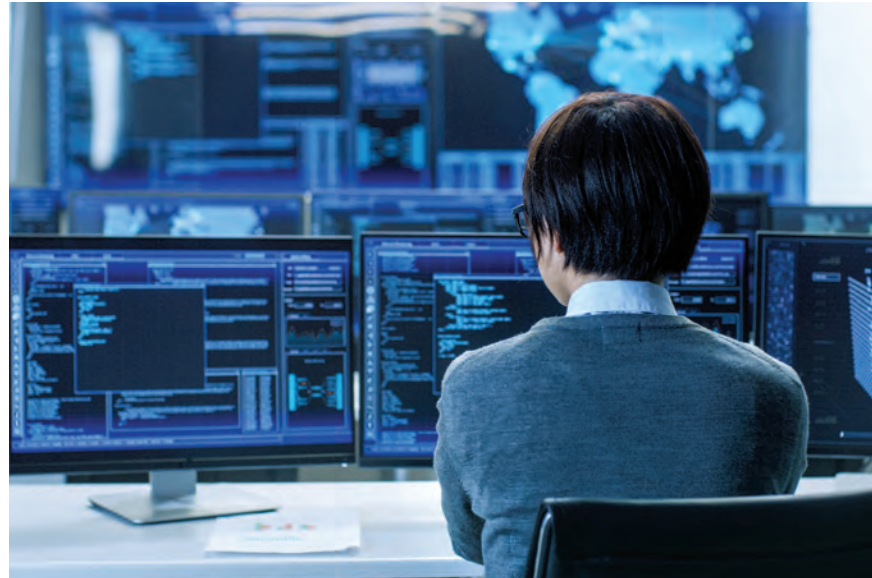
9. Consider password management: "People have a tendency to use the same password over and over and over again."

10. Institute multifactor authentication: "A lot of cybersecurity specialists and experts say that having multifactor authentication goes a long way towards deterring the cyber criminals."

11. Watch out for phishing: "Be careful of what you're seeing in your emails, be careful clicking on attachments. ... We've been seeing more and more phishing attempts against senior executives in a company."

12. Download security updates: "One way to protect you against that is making sure you're using the most up-to-date security solutions."

13. Use hyperscale cloud providers: "We're all using leading and best-in-class security policies and protocols. ... There's



no way law firms can match that in scale. ... There's no doubt we can do a much better job protecting their own data or their clients' data than what they could do."

14. Conduct thoughtful evaluation of technology providers: Bring in a number of different stakeholders "to really vet and ask questions of these providers, and get that level of detail."

15. Be social and secure: "We're seeing social media is becoming an increasing vector for cyber criminals."

16. Be cyber-aware in public: "You want to make sure you're always logging into your company's virtual private network ... so data is exchanged only over your own network."

17. Create an incident response plan: "It's only a matter of time. ... You want to have a game plan in place in case you are hacked and there's a data loss issue."

18. Look into cyber insurance: "If you're thinking about acquiring cyber insurance, make sure you

really understand the scope of that agreement."

19. Email = front page of the newspaper: "I think about email being more like a postcard than a sealed envelope."

20. Learn from others: Citing among others IAPP, the RSA, the FTC and the Ponemon Institute, "This whole area of privacy and cybersecurity is constantly evolving and changing, so you want to do your best to make sure you're keeping up to speed." ■

CHIEF LEGAL OFFICER V. GENERAL COUNSEL

WHEN LARRY WEISS JOINED LEADING CHIP-maker company Analog Devices Inc. as vice president, general counsel and secretary on Feb. 11, he began reporting to Margaret Seif, chief legal and people officer. Yes, the general counsel reports to the chief legal officer.

The legal department at the Norwood, Massachusetts-based business has adopted a not unheard of but still fairly uncommon practice of employing both a CLO and GC.

"Larry will oversee our entire legal group and report to Margaret, who provides oversight for several functions at Analog Devices including legal, HR, and communications," a company spokesman said in advance of the arrangement.

Indeed, the breakdown of duties between a CLO and GC within departments that have both is generally the same across companies and industries—the CLO is heavily involved in the business, while the GC mans the legal function, in-house legal experts said. But the reasons for adopting such a model vary, they added.

In some cases, "what [the department] is doing is elevating the GC to the C-suite and giving a promotional opportunity to someone on the inside" whom the company is happy with and would like to retain, said John Gilmore, managing partner at BarkerGilmore. "Then the CLO is the person doing the higher-level corporate functions, the higher-



value matters for the company, while the GC is there to run the actual day-to-day law department."

Bestowing the title of GC on several in-house lawyers, all of whom report to one CLO—similar to arrangements where several deputy GCs report to one GC—also helps retention, Gilmore added.

"It makes them feel of value to receive that title," he said. "They're happy to be able to throw their weight around with that title on their business card."

Added Susan Hackett, CEO of Legal Executive Leadership, a consultancy for corporate law departments: "Most law departments are reasonably flat—there's not a lot of places for people to go. You may have someone who came in at the associ-

ate GC level, and five, 10, 20 years later, they're still there. This is a way to give someone a better title and a promotion."

Legal departments with both a CLO and GC also generally are seen within large companies with revenue dollars in the billions, said Bob Graff, a partner and recruiter at legal recruiting firm Major, Lindsey & Africa. Last summer, publishing giant Hearst Communications Inc., which reported a revenue of \$10.8 billion in 2017, appointed two GCs to replace its former GC, who was promoted to CLO.

Industry also can play a role, added Charles Volkert, executive director of Robert Half Legal. Given all of the issues around data privacy and security, tech companies may be more likely than other businesses to adopt a CLO-GC model. Indeed, both Airbnb Inc. and PayPal have done so in recent years.

Other CLO-GC situations may arise when companies merge, said Graff, who also emphasized that in any legal department where both roles exist, their duties are discrete.

"Unless you're the CLO or the assistant secretary or corporate secretary, you're not dealing with the board, the investors, the proxy issues, the shareholder matters," he said. "You may have a GC title, but you're not doing any of the corporate governance."

—KRISTEN RASMUSSEN

PRACTICAL ADVICE FOR NEW IN-HOUSE COUNSEL

BY NOEL ELFANT

AFTER 25 YEARS WORKING IN-HOUSE, including the last 15 as general counsel to both publicly and privately held companies, I am returning to private practice. But as I make my move from inside to outside counsel, I thought it helpful to provide advice to those who are contemplating a move in the other direction.

If you are an outside counsel contemplating a move in-house, how will your skills transfer to your new role as an in-house lawyer?

Outside counsel typically are retained for a particular purpose. They are specialists, hired guns. They are expected to resolve a case, close a transaction, or draft a contract. The client is paying for and expects a dogged, single-minded determination in getting the job done—both well and efficiently.

Your specialty may serve you well if you join a large in-house legal department. Many of these legal departments are run like law firms, with practice areas for various disciplines—securities, compliance, privacy, real estate, human resources, etc. If you join an in-house legal department like this, you may be expected simply to continue to do what you do best only with a singular focus on your new employer.

But if you move in-house, especially as



is centered on the latter part of that equation. To succeed in your new position, you must balance your primary role as a lawyer with your larger role as a business executive.

My philosophy can be broken down into six, interrelated principles: (i) ask questions, (ii) act with integrity, (iii) expand your circle of influence, (iv) fill vacuums, (v) be transparent and respectful, and (vi) understand that business is relational.

1. ASK QUESTIONS

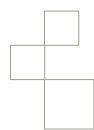
You don't know everything. Take time to learn the nuts and bolts of the business.

rience in the field. They have lived in the nuance of the practical world. They know the customer and the competition. Don't shortchange that knowledge. Understand and try to work within the framework of that world. You don't have the luxury of providing advice in a vacuum; and, even if you trust your instincts, test them with your business counterparts.

Early in my in-house career I was told in a review that it's not enough to be right—you also have to bring people along. The best way to do that is to ask questions. This serves several purposes. One, it shows humility and engenders trust in your advice. When you ask questions, you're admitting that others have information that can inform your decisions. Two, you gain valuable insight that may challenge your assumptions and affect the options you are considering. Three, when others are invested in the process, they are more likely to buy-in to and follow your advice. The bottom line: by understanding the business and generating buy-in from your business associates, you more likely will contribute to the company's success.

2. ACT WITH INTEGRITY

I began my in-house career at a consumer products conglomerate: a holding



You don't have the luxury of providing advice in a vacuum; and, even if you trust your instincts, test them with your business counterparts.

general counsel or as part of a smaller legal department, your job likely will be less defined. You undoubtedly will be asked to do things that are outside of your specialty or comfort zone. What then? What does it take to succeed in this environment?

Without doubt, your skill as a lawyer is the ante required to play, but your business acumen will set you up to win. My advice

Whether you are just starting a new position and need to learn the business generally, or you are helping develop a strategic or tactical approach to a new challenge and need to understand the context in which your advice is sought, ask questions. Don't be afraid to show your ignorance. In fact, you can learn a lot from your business counterparts. They have a wealth of experience

company that owned among its portfolio of power brands a tobacco company and a manufacturer and marketer of distilled spirits. I remember well traveling with my mentor, then an associate general counsel, and asking him how he morally justifies working for cigarette and spirits maker. He told me he acted every day ethically and appropriately within the law. He took pride in his work. His work, he said, was a reflection of himself, and the work of the department was a reflection of the company. He taught me the value of personal integrity—doing right and doing well.

Later in my career, as general counsel and chief compliance officer of a publicly-traded company, that ethic served the interests of both myself and the company. It gave me moral standing with the board in particular and within the organization generally to successfully conclude internal investigations of senior officers including a board member, to undertake on behalf of the company a self-disclosure to U.S. Customs, and to recall a profitable product.

But integrity means more than ethical conduct; it also means doing things well. In reviewing distributor promotions and consumer advertising, it means paying attention to grammar and spelling—ensuring that company's public image is protected meticulously and consistently. The same is true for contracts with business partners and dealings with competitors and trade associations. Your work product is a reflection of the legal department, and, by extension, of the company. You are a lawyer but also a business executive: protect the company but also protect its reputation.

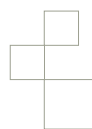
3. EXPAND YOUR CIRCLE OF INFLUENCE

One of the attractions of working in-house is that you don't have to generate business and you can focus on one client. Not so fast. A business is made up of multiple internal clients, and your success depends on winning the confidence and trust of all of them.

The Board. The C-Suite. Human Resources. Finance and Internal Audit. Sales and Marketing. The engineering staff and new product development teams. Supply Chain. Import-Export. To be successful, the legal function must influence all levels of management, across departments and geographic boundaries. It's not enough to

help one group to the exclusion of the others. You must ingratiate yourself to them all. To paraphrase Cheap Trick, you want them to want you. It is not effective to operate by fiat. In short, you have to be a rainmaker even within the company where you work.

If you ask questions and act with integrity, you will engender confidence within the organization and develop referral business. Success breeds success. Business teams will see the value you add: they will want you involved in the next project and they will recommend you to other teams. Help other teams achieve their business objectives in a similar manner, and they will become a source of internal business referrals as well. This is important because you want the business to consult with you early and often



If you ask questions and act with integrity, you will engender confidence within the organization and develop referral business. Success breeds success.

so that with your input, mistakes can be avoided, risks mitigated, and business objectives achieved. By expanding your circle of influence within the company, you will help drive business growth and become a valued contributor to the company at large.

4. FILL VACUUMS

As you work across functions, management levels and geographies, you will see things that require attention. Sometimes you will spot legal issues that can be addressed before they fester into legal problems; sometimes you will spot business issues that can be addressed before they drain away profit margin. It's not enough to call them out. Volunteer to address them.

When product liability litigation revealed safety issues that could be mitigated to prevent or lessen the likelihood of similar claims, I proposed creation of and volunteered to lead an international team of engineers and sales and service associates to conduct a failure analysis of the product and a comprehensive review of processes and protocols surrounding the marketing, sale, installation and service of the product. This was more a business project than a legal one. We retrofitted the installed

base, modified the new product, improved the signage and warranty, revised protocols for the sale, installation and service of the product, and prepared a safety video for distributors, installers and customers. The project generated significant goodwill for the company, and sales of the flagship product improved dramatically.

Another example: after working with the engineering teams to revamp our new product development systems, we mapped our patents and those of our key competitors. The project revealed significant white space in a critical and developing industry technology. Armed with this knowledge, I wrote a confidential memorandum to the CEO outlining patent acquisition opportunities to stake out a leadership position in the

nascent technology. As a result, acquisitions were approved, initiated and concluded, and served the company well as it moved aggressively and successfully into new markets.

The point here is to fill vacuums. When you see something, say something, and, more importantly, volunteer to do something. By filling vacuums, you will expand your circle of influence within the company, add value in unexpected ways, and benefit both the legal function and the company in the process.

5. BE TRANSPARENT AND RESPECTFUL

If you ask questions, act with integrity, expand your circle of influence and fill vacuums, you will help drive growth in the company, and, undoubtedly, in the demands placed on the legal department. As you grow the legal function, a new skill will be required of you: management of others. Be honest with those who work for you. Give them clear direction on what is expected of them, and hold them to it. These are clichés, but treat others as you would like to be treated, and praise in public and criticize in private. Remember that the legal department must always serve as an example to the company's other functions. This is most obvious in the area of

human resources. You will advise other departments to document employment issues and engage in progressive discipline, so do that within your department as well. These simple rules envelope both transparency and respect.

Respect also means trust. Trust your team members to do more than they think they can handle. Train them to succeed, but resist the temptation to micromanage. It is okay for you and your team members to operate “just under the water’s surface”—that is, to be so busy or challenged as to feel a bit overwhelmed, like you are treading water. This not only demonstrates trust in yourself and your team, but will keep you and your team sharp and engaged.

6. BUSINESS IS RELATIONAL

The most important lesson I learned in law school was from my contracts professor, Ian Macneil, who instilled in me as a first-year law student a valuable lesson—business is about relationships. Professor Macneil wrote extensively on the relational theory of contracts. He broached the subjects of consideration, offer and acceptance only toward the end of the first semester, stressing instead the importance of using contracts and, in particular, the negotiation of contracts, to establish a relationship of trust between the contracting parties. Rarely will a contract document be a truly discrete transaction. Rather, it is the framework within which the parties will transact business—a lasting relationship from which both parties intend to benefit.

It is easy to win an argument or the language you want in a particular contract provision, but understand that your victory may come at a cost. Understand the underlying value of the relationship to your business and to the other side. This comes back naturally to my first point: ask questions. Learn the context within which the parties are conducting business and what each side wants from the relationship. For this, your team members in the business often hold the key—they operate daily in that world.

Work to understand what the other side wants in a negotiation, and provide it to them if you can do so without jeopardizing what your team wants and expects from the relationship. It is OK, for example, to develop a trusting relationship with

your counterparts on the other side of a transaction, even in litigation. In a bet-the-company patent litigation, I met early over lunch with the plaintiff’s general counsel; the personal rapport we developed and the understanding we gained of each party’s priorities helped each of us reach an appropriate settlement when the time was right.

To get the job done and done well, you may have to step into a business role now and again. Is there another way to accomplish your company’s key objectives and still provide the other side with what they require to get the deal done? Fill that vacuum. Speak up and propose a solution. When a customer wanted proof of concept before purchasing a new product, I proposed an equipment lease with an obligation to purchase the products when certain key performance indicators were achieved. The solution focused on establishing a relationship, not on winning the discrete transaction.

You will find that a “relational theory of business” can help you tackle the

internal politics of your own organization as well. You often may find that the most difficult negotiations are with your own team, especially early in your in-house career when business associates may view you strictly as a risk avoider. Business naturally encompasses risk. Be honest with your business associates about the risks you see with their approach and helpful about alternatives to achieve their business objective. Your goal is theirs as well—to drive business growth.

Asking questions, acting with integrity, expanding your circle of influence, filling vacuums, being transparent and respectful, and understanding that business is relational will help you build a reputation within your company and industry as a can-do, business-focused lawyer.

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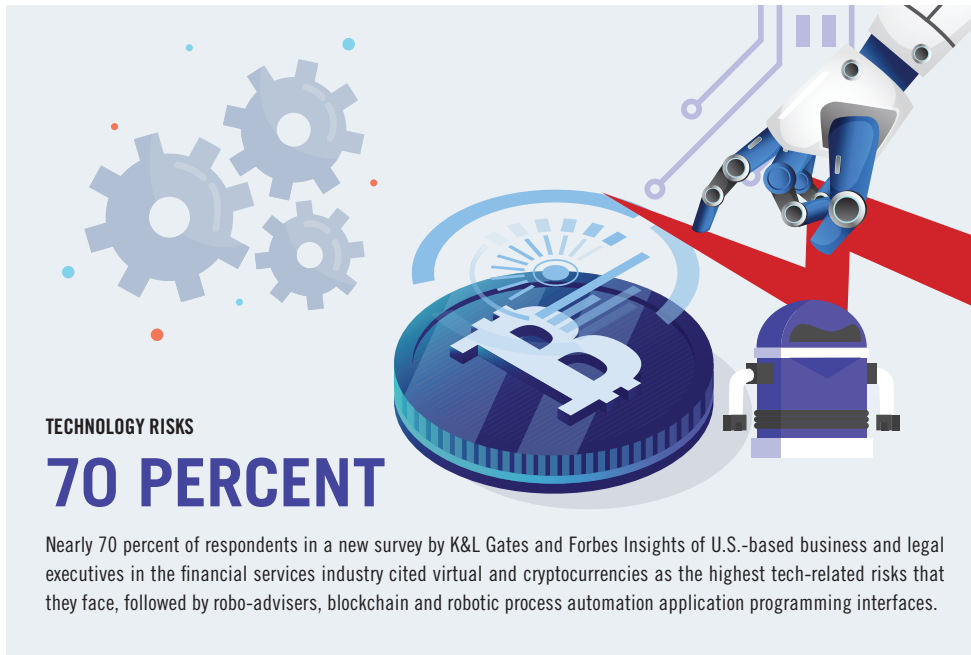
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“I think it’s a matter of getting lawyers comfortable with helping companies solve problems related to risk. That stems from a number of different vulnerabilities that enterprises are faced with: weak systems, human error, a workforce that is not equipped to handle nation-state threats on a daily basis.”

JENNIFER DETRANI

GENERAL COUNSEL AT CYBERSECURITY STARTUP NISOS



WHAT'S NEXT FOR INTERNET-CONNECTED TOYS?

 BY DAN CLARK

AS HOUSEHOLD ITEMS BECOME INCREAS-ingly connected to the internet, children's toys are no exception. Scott Pink, special counsel at O'Melveny & Myers in the Silicon Valley office, was formerly the general counsel of Prima Games and sees the data and privacy concerns elevating among families with more toys being hooked to the internet.

Pink spoke to Corporate Counsel about internet-connected toys, the information these toys collect and the laws that govern the space. This conversation has been edited for length and clarity.

CORPORATE COUNSEL: What are some of the regulations companies who manufacture and sell internet-connected toys need to be aware of?

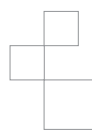
SCOTT PINK: The primary regulation is a federal law called the Children's Online Privacy Protection Act, which regulates the collection of personal data from a child under 13 years old. That would be the primary federal law that governs children's privacy. In addition to that, there are sort of general privacy laws that would apply to the collection of data in general such as California's Online Privacy Protection Act; there is the new privacy law that is coming into effect in 2020. There are elements of those kinds of state laws that could also apply if you're collecting data from someone between 13 and 19.

CC: What kind of data is being collected from these internet-connected toys?

PINK: The definition of personal data was expanded in 2013 to the COPPA rule by the [Federal Trade Commission]. It's pretty broad. There are some obvious things like first and last name or contact information. It could also include things



Scott Pink



"... [M]y advice would be to collect what you need, and if you determine that the device is targeted at children, you need to provide notice to get their consent to the data collection."

like if it's an app or a toy that might require you to enter a username or a screen name. It includes specific identifiers. There are also things like photographs and video or audio files that contain a child's image or voice. The toys sometimes collect geo-location information.

CC: Would the best advice for these manufacturers be to not retain that information? Or is there a way to retain this

information and still be in compliance with these data privacy laws that govern children's personal information?

PINK: There are a couple of considerations. First of all you need to determine what type of information you need to make the device. If there is information you need to make the device usable, that's information you need to collect and perhaps retain for as long as the person uses the device. Typically my advice would

be to collect what you need, and if you determine that the device is targeted at children, you need to provide notice to get their consent to the data collection. I wouldn't say not to collect any data. I would say that if you do have to collect data and if you do want to collect data for something like marketing, then you need to make sure you follow the COPPA rules, which are to provide notice and get parental consent.

CC: Are companies, in your opinion, paying attention to the COPPA rules and making sure notices are going out with the internet-connected toys?

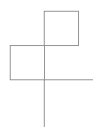
PINK: I think the more sophisticated and mature toy companies are very well aware of COPPA. In particular because there are a number of consumer watchdogs that are very focused on children's privacy. I think the more responsible companies understand the requirements of COPPA and try to make sure that they're getting consent. But there are companies that have not done that, and it could be inadvertent

or intentional, but in either case you can end up on the wrong side of a regulatory action by the FTC.

CC: Does COPPA include any specifications over how a company should be handling its cybersecurity?

PINK: COPPA does not have any security standard. I think California has a law

your security is supposed to be designed in a way to protect information in accordance to sensitivity. For example, children's information might be deserving of greater protection than perhaps email addresses, in general, of adults. This kind of information would warrant a more rigorous type of security just because of the risks to the individual.



"I think the more responsible companies understand the requirements of COPPA and try to make sure that they're getting consent."

that's coming into effect in 2020, which requires any kind of "internet of things" device has to have reasonable security. That law would theoretically apply to these kinds of toys. I would say the general principal that has evolved based on regulatory action from the FTC and the evolution of the California law is that

California is sort of leading the trend toward more robust data security requirements, so I would suggest that anybody operating in the field of the internet of things or internet-connected toys keep an eye on what's going on in California and whether other states might follow their lead. ■

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INTERCONTINENTAL HOTELS GROUP APPOINTS CHIEF LAWYER

BRITISH GLOBAL HOSPITALITY COMPANY
InterContinental Hotels Group PLC has promoted its longtime executive vice president, general counsel and company secretary, **GEORGE TURNER**, to the role of chief commercial and technology officer.

Nicolette Henfrey, who has served as IHG's deputy company secretary and head of corporate legal, has been tapped to succeed Turner, according to an announcement in February. A company spokesperson referred to the announcement in response to a request for interviews with Henfrey and Turner.



George Turner

Both will continue to serve on IHG's executive committee and report to IHG CEO Keith Barr.

IHG is headquartered in Denham village of Buckinghamshire, England, and franchises, leases, manages or owns more than 5,500 hotels throughout the world, including Holiday Inn, Crowne Plaza Hotels & Resorts, Regent Hotels & Resorts, Candlewood Suites and Staybridge Suites. IHG has more than 375,000 employees in its hotels and corporate offices in nearly 100 countries.

In his new role, Turner will be responsible for global sales, distribution, revenue management, property systems, digital and voice, technology and information security. While serving as IHG's chief lawyer for a decade, he oversaw the company's approach to risk and assurance, information security and compliance.

Turner previously had a stint with DLA Piper before going to work for the now-defunct British chemical company Imperial Chemical Industries, where he served as deputy company secretary, among other roles.

As general counsel, Henfrey will oversee IHG's approach to corporate



governance, risk management, insurance, regulatory compliance, internal audit, legal and hotel standards, according to IHG.

She joined IHG in 2001 as vice president and senior group legal adviser and in 2011 was appointed deputy company secretary, a position in which she worked with the board, executive committee and the wider organization to ensure legal and regulatory compliance.

Henfrey previously worked for Linklaters in London and Findlay & Tait, now Bowmans, in South Africa.

acquisitions, litigation, commercial, regulatory and employment. It is not clear

when she started or if she already started at the company. A company representative did not respond to multiple requests for comment.

"Melissa is a selfless leader who brings an extreme amount of success seen throughout



Kepro Yoga

her legal career," Joel Portice, the company's CEO, said in the press release. "With Melissa's industry knowledge of guidance on legal matters and strategic business objectives, she will be a wonderful addition to the executive team."

According to her LinkedIn profile, Leigh most recently worked at Intermedix, a health care information technology and analytics company. She worked at Intermedix since 2013, where she has worked as vice president and associate general counsel, chief compliance officer and, most recently, senior vice president,

KEPRO NAMES 1ST GENERAL COUNSEL

A medical case management company announced in February the hiring of its first top lawyer.

MELISSA LEIGH will become Kepro's first general counsel and chief compliance officer. She will provide guidance on matters of governance, mergers and

general counsel and chief compliance officer. She also worked as the top in-house lawyer as ESi Acquisition Inc. and worked as general counsel of South Western Regional Planning Agency. She also worked as a community development coordinator at the Norwalk Development Agency. She graduated from Pace University School of Law.

According to its website, Kepro is the nation's largest "CMS-designated quality improvement organization and care management organization." Kepro received backlash from the Oregon state government in January after the Associated Press found that 17 mentally ill patients had been improperly discharged by Kepro from state-funded residential facilities. The report indicates that the Oregon Health Authority hired Kepro to review the cases of 1,600 patients to determine if all of them needed to be in the facilities.

ANALOG DEVICES PICKS UP GENERAL COUNSEL

A longtime top in-house lawyer in the medical device industry is moving to a leading semiconductor business.



Larry Weiss

Norwood, Massachusetts-based Analog Devices Inc. appointed **LARRY WEISS** to vice president, general counsel and secretary in February. In his new role, Weiss oversees the company's global legal function, including mergers and acquisitions, intellectual property work and compliance matters, according to a statement announcing his hire.

Weiss joins Analog Devices from Medtronic's Minimally Invasive Therapies Group, where he had been vice president and general counsel for four years, leading the \$9 billion global medical device business' Legal and Healthcare Economics and Reimbursement functions.

"We are delighted to welcome Larry to Analog Devices," Seif said in the statement. "Larry's experience counsel-

ing CEOs and senior leaders on a wide spectrum of legal matters, from organizational transformation to strategic transactions to intellectual property, make him an excellent addition to ADI. We look forward to his leadership as we continue to drive ADI to ever greater levels of success."

Weiss was not available for comment.

Analog Devices is one of the world's largest chipmakers. In 2016, it acquired competing chipmaker Linear Technology Corp. for \$14.8 billion in cash and stock.

Prior to joining Medtronic in January 2015, Weiss was vice president and general counsel at Covidien Surgical Solutions, the largest global business unit at Covidien before its acquisition by Medtronic. Since 1999, he has held in-house roles of increasing responsibility at Covidien and its predecessor company Tyco Healthcare, according to his LinkedIn profile.

A graduate of Boston University School of Law, Weiss began his legal career as an associate at O'Connor Broude & Aronson before moving to Goodwin Procter, where he was a corporate associate, according to LinkedIn.

SEC NAMES NEW DEPUTY GC FOR LAW AND MANAGEMENT

The U.S. Securities and Exchange Commission has named **ELIZABETH MCFADDEN** as its deputy general counsel for general law and management of the agency, a job that entails being the managing executive for the SEC's Office of General Counsel, headed by Robert Stebbins.

The SEC said McFadden will provide daily oversight into representing the commission, its members and employees in litigation and will advise the commission and its divisions and offices on their legal responsibilities, personnel management and budget.

In a statement, Stebbins said, "We are excited to have Elizabeth join us at the commission. I am confident that given her extensive experience and legal expertise, the commission and its employees will greatly benefit from her legal counsel."

McFadden was unavailable for comment, but in a statement said she was grateful for the opportunity to join the SEC team, adding, "I look forward to working with them toward advancing the SEC's mission for American investors and markets."



SEC

McFadden has regulatory experience. She joined the SEC after working 15 years in the U.S. Department of Education, most recently as deputy general counsel for ethics, legislative counsel and regulatory services. Prior to that she worked seven years as assistant general counsel for the department's regulatory services division, managing staff providing advice on regulatory issues.

From 1991 to mid-2003 she was an associate, then partner, at Dow Lohnes, now part of Cooley, practicing communications and transactional law. McFadden earned her law degree from the University of Virginia School of Law.

While at the Department of Education, McFadden appeared to be busy the last couple years on projects to shrink government.

In May 2017, McFadden was named to a 15-person committee to recommend how to reorganize the education department and cut its workforce in coming years. The group included a mix of political appointees and career employees.

The plan met fierce criticism but went into effect last month and will take several months to implement. CNN reported the overhaul will involve consolidating several offices within the department.

Before she left, McFadden also was working on a project to shrink the number of regulations on "education stakeholders" by reviewing, rescinding and modifying outdated and burdensome rules.

She co-chaired the department's Regulatory Reform Task Force, whose mission was to reduce the burden of rules, including the financial cost, on states, school districts, educational institutions and others. The group's goal is to submit no less than 25 deregulatory actions to the Office of Management and Budget by Sept. 30.

DAVID KERN; PHOTO: MIKE SCARCELLA/ALM

MUSICAL COPYRIGHT ISSUE RISES FROM THE DEAD

BY SCOTT GRAHAM

PAUL FAKLER THOUGHT THAT THE FIGHT OVER musical artists' rights to reclaim their copyrights was settled 20 years ago.

That's when Congress altered the Copyright Act of 1976 to provide that sound recordings are "works made for hire" that can't be reclaimed. The change prompted such an uproar in the music industry that Congress retracted the provision a year later, the Orrick, Herrington & Sutcliffe partner recalls.

Fast-forward to early February, when John Waite, Joe Ely, David Johansen and other musicians backed by Blank Rome filed two putative class actions. They allege that Sony Music Entertainment and Universal Music Group have "routinely and stubbornly refused" to relinquish their copyrights on musical works more than 35 years old. The labels once again argue that the recordings are works made for hire, which carves them out from the termination provisions of Section 203 of the Copyright Act.

"It's a zombie issue that I thought had fizzled," Fakler says.

Instead, it's alive and marching.

Section 203 provides that "in the case of any work other than a work made for hire," the grant or transfer of a copyright executed after 1978 is subject to termination after 35 years. The idea was to give authors a second chance to exploit works they might have bargained away when in a weaker negotiating position.

Musical artists started serving notices of termination several years ago. According to the class complaints, signed by Blank Rome partner David Kistler, they've been met with "stubborn and unfounded disregard of their rights under the law and, in many instances, willful copyright infringement."



According to letters attached to the complaints, Sony and Universal argue that they or their predecessor labels commissioned the sound recordings as works made for hire. Universal's contracts with the musicians state that they "shall be our employees for hire and all such master recordings shall be works made for hire under the United States Copyright Law."

Further, the labels point out that Section 101 of the Copyright Act explicitly defines works made for hire as including "a work specially ordered or commissioned for use as a contribution to a collective work" or "a compilation."

"The sound recordings were specially commissioned for use in compilations, i.e., long-playing record albums," states UMG's May 31, 2018, letter to Waite signed by Cowan Liebowitz & Latman counsel Thomas Kjellberg. It demands



Paul Fakler

that Waite cease and desist from publishing music from his 1982 album "Ignition" on Spotify and other digital services.

Fakler generally represents digital music services such as Sirius XM Radio and isn't involved in the class actions, though he's upfront about his general disdain for the recording industry.

He describes the industry's 1999 lobbying as an effort to "screw over the artists in advance." The subsequent withdrawal of the provision ought to dispose of the work-made-for-hire argument, he says.

Nor can the labels rely on contractual provisions to supersede the artists' termination rights. Section 203 expressly says that "termination of the grant may be effected notwithstanding any agreement to the contrary," he notes.

The "compilation" exception applies only to the selection and arrangement of

works, Fakler says. It might apply if a publisher had commissioned individual artists to contribute tracks to, for example, a Jimi Hendrix tribute album. It would not apply to an ordinary collection of songs that make up a music album.

So why is the issue only being litigated now, five years after Section 203 began kicking in for sound recordings?

It's because the major music publishers have negotiated new deals with their superstars, Fakler says. "They're

the only ones who can afford to take on the recording industry," he says, though the class action might change that. "I'm sort of surprised and disappointed that the litigation hadn't started before now." ■

FED. CIRCUIT COOL TO TAKINGS CLAIM IN PTAB CASE

WHEN THE PATENT AND TRADEMARK OFFICE cancels patents in America Invents Act proceedings, is that an unconstitutional taking of property without compensation?

The U.S. Supreme Court described it as an open question last year, but the U.S. Court of Appeals for the Federal Circuit didn't sound eager to run with it during arguments in early February.

A Justice Department lawyer faced minimal pushback as she defended a patent owner's constitutional challenge to covered business method review, one of several methods established by the AIA for attacking patent validity at the PTO.

"We agree that valid patents are property interests," Katherine Twomey Allen told the court during *IBG v. Trading Technologies*. "Our point on the takings issue is merely that when the board cancels a patent," and the Federal Circuit subsequently affirms that decision, "the patent owner never had a valid property right, and therefore there was no taking."

The Supreme Court ruled last year in *Oil States v. Greene's Energy* that AIA proceedings do not violate Article III or the Seventh Amendment. But Justice Clarence Thomas' opinion emphasized the narrowness of the holding. He explicitly noted that the court was not deciding if the cancellation of a patent issued before the AIA came into law in 2011 would effect a taking.

Trading Technologies Inc. is seeking to explore that issue in a series of appeals argued in February. The Federal Circuit in 2017 found two patents on a graphical user interface for electronic trading eligible for patent protection, but the Patent Trial and Appeal Board subsequently



Kimberly Moore

found two nearly identical patents ineligible later that year.

When it obtained its patents in the early 2000s, Trading Technologies had no way of knowing the AIA would be enacted and lead to mass invalidations, Trading Technologies argues. Covered business method review "violates the takings and due process clauses of the Fifth Amendment to the United States Constitution by retroactively depriving [Trading Technologies] of its property in a non-Article III forum without a jury," the company argued in briefs to the court.

Most of the argument on takings turned on whether Trading Technologies should even be allowed to raise the issue on appeal. Allen argued the company forfeited the issue by failing to present it to the Patent Trial and Appeal Board. Trading Technologies says doing so would have been futile because administrative agencies can't rule on constitutional challenges.

Allen pointed out that the PTAB has addressed constitutional challenges,

such as in the recent sovereign immunity decisions.

Judges Kimberly Moore and Jimmie Reyna sounded skeptical. "It's been my understanding that the PTO, as part of the executive branch, isn't permitted to rule on constitutional challenges," Moore said. "Am I just completely mistaken in my understanding of the law?"

"Well, your honor, I know that the board has addressed constitutional issues in the past," Allen said.

"I don't care if the board's done it in the past," Moore said. "Here we've got an argument that they're not permitted to do it. And I want to know from you, are they permitted?"

"My understanding is the same as Judge Moore," Reyna said. "Could the PTO rule itself unconstitutional?"

Allen argued that it would not have been futile for Trading Technologies to raise the retroactivity issue, because the PTAB, without ruling directly on the constitutional question, could have exercised its discretion not to institute proceedings or terminate them if it believed the constitutional challenge had merit.

As to the merits of the takings claim, she argued that the cancellation of a patent through covered business method review does not constitute a taking, "because it rests on a determination that the patent holder never had a valid property interest in the first instance."

Baker & Hostetler partner Michael Gannon argued for Trading Technologies. Byron Pickard of Sterne, Kessler, Goldstein & Fox argued for PTAB petitioner IBG, also known as Interactive Brokers Group. ■



A SPECIAL REPORT

GLOBAL MARKET

■ **LEGAL OPS** From mature to burgeoning: legal ops around the globe. Page 22

■ **BREXIT** Legal depts brace for the “darkest possibility” of a no-deal Brexit. Page 26

■ **PRIVACY** The rising importance of international data protection laws. Page 30

■ **CORRUPTION** Lack of control is contributing to a global crisis in democracy. Page 34

■ **VENEZUELA** Could sanctions bring new opportunities for U.S. businesses? Page 36

■ **LEGALTECH NEWS** Australia’s legal tech scene is making waves. Page 38

■ **RISK** Top tips for in-house counsel on how to identify and manage risk. Page 42

■ **DATA** As more countries seek adequacy decisions with EU, will U.S. get left behind? Page 44



GLOBAL MARKET



ILLUSTRATION
BY TIM WEBB



FROM MATURE TO BURGEONING

A look at legal operations around the globe.

BY DAN CLARK

IT IS ONLY IN THE PAST 10 TO 15 YEARS THAT LEGAL DEPARTMENTS BEGAN TO

ponder ways to reduce spend and maintain a high level of efficiency in their departments and from their firms, though they didn't use the term "legal operations" to describe what they were doing.

Catherine Moynihan, the associate vice president of legal management services at the Association of Corporate Counsel in Washington, D.C., says that when she started working at the ACC there was a concerted effort to convene and chief operating officers of legal departments to find ways to cut down costs.

"These people seemed to be prevalent in companies that are heavily regulated. If you think of legal operations as being focused on people, process and technology; the other piece that drives operations is regulation," Moynihan explains.

Now, several internal legal departments in the U.S. have expressed the necessity of having a robust and mature legal operations function. The maturity of legal operations in the U.S. has led to groups like ACC adding a legal operations group and the formation of groups solely focused on legal operations like Corporate Legal Operations Consortium, or CLOC. Both groups have traveled outside the U.S. to evangelize the importance of the function.

GETTING STARTED

Sheldon Renkema, the general manager of legal at Australian conglomerate Wesfarmers, says a culmination of three factors brought him from a full-time practice in mergers and acquisitions, a practice he still maintains, to working in legal operations.

"I had for some time been a keen observer of 'newlaw' developments in Australia and the (slow) change of traditional law firms to respond to these market developments," Renkema, who is based in Perth, Australia, explains in an email to Corporate Counsel. "I felt strongly that



Catherine Moynihan, associate VP of legal management services, Association of Corporate Counsel.

this created an opportunity that I should explore to help the legal team at Wesfarmers to better handle a growing workload, be more efficient, measure the contribution we were making and to allow us to focus on the work that our experienced lawyers were most suited to doing—work of high complexity and most aligned with the strategy of our company. Second, my manager, our Group General Counsel, had learned of CLOC and been invited to participate in a CLOC group in Australia and, knowing my interest, she encouraged me to be part of it.”

In September, CLOC officials found that legal operations in Australia was still in the early stages, however, there has been an eagerness to grow.

“A key observation from the CLOC Institute in Australia in September 2018 was that legal operations among Australian and New Zealand organisations are generally relatively immature compared to the U.S. or when assessed using the CLOC maturity model,” Renkema says. “Legal operations as a stand-alone function is therefore relatively new in Australia and still in a growth phase. With the relatively smaller sizes of our in-house legal teams it seems unlikely that the number of legal operations professionals in organisations will reach the scale that we are seeing in many U.S. organisations.”

Perhaps siloed and learning lessons from larger markets which have more mature functions, companies in African countries are also beginning to form their own legal operations functions. However, they are years away from maturity, Rian Hancock, a legal operations and technology consultant in Johannesburg, South Africa, says.

Hancock started his career as a barrister, where one of his struggles was the technical value that he was bringing to his clients. He then became a solicitor, and says those same problems he experienced as a barrister are even worse for solicitors and thought there must be a better way to deliver services for his clients. Hancock then went in-house for an insurance company and, while there, worked on his MBA. The research of his MBA, very specifically, focused on how corporate counsel make decisions to buy legal services. After

a stint working as the manager of legal management consulting for Deloitte South Africa, Hancock will be shortly opening his own legal operations and technology consulting company.

He says right now the major markets in South Africa, Kenya and Nigeria are about three to four years behind countries with more mature legal operations functions. One of the current challenges, he explains, is the

implementation of technology.

“There is a big drive towards digitization and implementation of effective legal technology but the price points are not viable for the African market,” Hancock says.

Hancock says that, in his experience, the cost of implementing sophisticated legal technology in Africa is approximately 14 times of what it is in Africa.

“That is one of our biggest problems; the need to find systems that are affordable for the local market,” Hancock says.

Having learned from the U.S. and other markets has been a benefit to the growth of legal operations in Africa, Hancock says; particularly when it comes to change management.

“We know change management must be a major focus on any implementation,” Hancock says.

Looking outside at legal operations outside of Africa means legal operations professionals “can find better ways to help bring lawyers along with us on the journey,” Hancock says.

“These are things that the U.S. market learned as they went along,” Hancock says. “We can take these kinds of things and make sure the things we’re implementing are able to be integrated. That gives us almost an immediate advantage on the markets that have had to make these mistakes over time.”

VARYING METHODS OF OPERATION

In the U.S., the priority of legal operations leans heavily on curbing legal costs and finding ways to get the biggest bang for the legal department’s buck. That is not the case for everywhere else in the world.

Hans Albers, the president of ACC Europe and the head of worldwide legal operations at Juniper Networks in the

Netherlands, says that regulation, rather than cost savings, is a key driver of legal operations in Europe.

"It is definitely something that started in the U.S.," Albers says. "It is only in the last couple of years that legal operations has made its way across the pond through large, multinational companies."

Albers says one of the key differences between legal operations in the U.S. and Europe, with the exception of the U.K. which is more similar to the U.S., is that U.S. companies tend to be more concerned with their outside counsel spend because of a higher level of litigation.

While in Europe, there is some degree of controlling spend because of litigation costs, Albers says legal operations are more focused on helping the business grow.

"We're looking at ops as a way to add value," Albers says. "We're trying to look at how efficiently the organization was run. Legal was more regarded as a biz function."

Meanwhile, Renkema says while that is a concern in Australia, it is not the main focus. He explains one area he views Australia in being ahead of the U.S. when it comes to legal operations is that legal departments in Australia are more likely to take advantage of "a more competitive external legal service provider environment."

"When I compare Australian lawyers to the U.S. lawyers I have briefed, external lawyers here are more open to fixing or capping fees, competitive pitching for work on a matter-by-matter basis or other fee arrangements," Renkema says. "External providers also provide value adds that are of substantial worth to us such as professional development, [key performance indicator] reporting, project management, technology assistance and advice."

Renkema notes there also appears to be more of a willingness to use new kinds of technology in Australia.

"I think that we probably have more opportunity to, and do, take advantage of the competitiveness of the Australian legal market—both among traditional law firms and alternative legal service providers, as they compete aggressively for the legal spend here," Renkema says.



Hans Albers, president of ACC Europe and head of worldwide legal operations at Juniper Networks.

Speaking for what he's seen in Africa, Hancock says corporate counsel tend to do 70 percent administrative tasks while only spending 30 percent of their time on complex legal matters.

"A lot of what I look at is how we can flip that utilization rate," Hancock explains. "That may not be a cost savings, but there is a value increase."

THE FUTURE OF OPERATIONS

As far as the U.S. and Europe are concerned, there isn't much legal operations professionals can do from one country to influence another, seeing as operations in both the U.S. and various countries in Europe have matured over the years, according to Moynihan.

"I don't see one side influencing the other side anymore," Moynihan says. "In the U.K. there are some interesting developments regarding the vendor community and law firms, but that is because law firms can only be owned by lawyers in the U.S. Multinationals are probably experimenting more with that I think will be influential over here."

For Renkema, he says there will likely be a boom in legal operations in Australia over the next year.

"I've seen an increasing number of people appointed to dedicated legal operations manager roles in the last year or so. I expect this will accelerate in the coming year. This will be very important for the ongoing development of legal operations in Australia," Renkema says. "Also, the general level of maturity of legal teams when it comes to legal operations is lagging and this needs to improve so that corporate legal teams can better do what they are mandated to do. Third, I would like to see CLOC in Australia continue to grow its reach and influence."

Hancock, who has started his own legal operations consulting firm, says he is hopeful for more mature legal operations in Africa.

"I think legal is still the last bastion of process improvement," Hancock says. "With the increase of artificial intelligence and the digitization of legal functions, you start getting more and more access to data. The value of legal operations kicks in with the access to data." ■




GLOBAL MARKET

LEGAL DEPARTMENTS

Brace for
'darkest
possibility'
of a no-deal
Brexit.

BY PHILLIP BANTZ



THE BREXIT COUNTDOWN CLOCK ON ALESSANDRO GALTIERI'S IPAD served as a constant reminder of the uncertainty that loomed larger with every tick of the clock. Not that he needed another reminder.

Brexit and the possibility that the U.K. would leave the European Union without having a deal in place had been dominating the news in London, where Galtieri spends his days as deputy general counsel of global telecom company Colt Technology Services.

"I used to be very optimistic, but we're now at the stage where there seems to be an impasse," says Galtieri, who also serves as U.K. country representative of the Association of Corporate Counsel.

Galtieri—and undoubtedly many other similarly situated in-house counsel—hoped that "cooler heads would prevail" and the March 29 deadline for the U.K. to leave the EU would be extended or a deal would be made to define the U.K.'s relationship with the EU in a post-Brexit world. Neither had happened as February came to a close.

A no-deal Brexit could spawn many complications and headaches: The U.K. would abruptly exit the EU without the benefit of a transitional period. Border checks could be reintroduced. There might be major disruptions in supply chains. Companies and legal departments in the U.K. might have trouble recruiting talent from the EU. References in contracts to EU law, which "have been inserted in every contract under

the sun for the last 20 years," would no longer be relevant, according to Galtieri.

"The no-deal Brexit is the darkest possibility," says Reid Whitten, a London-based partner at Sheppard, Mullin, Richter & Hampton who has an international business practice. "No one's prepared for it. No one has a plan. It's pretty grim at this point."

He adds, "Everyone's glued to the news of Brexit, but none of the updates are substantive."

'LOSE-LOSE SITUATION OVERALL'

As a management consultant for international law firms and global corporate legal departments, E. Leigh Dance, president of ELD International LLC, has been hunkered down with in-house leaders on both sides of the Atlantic since the U.K. voted by a narrow margin in 2016 to split with the EU.

"Corporate counsel and the multi-disciplinary corporate teams dealing with Brexit are fed up with lacking answers to even the most basic questions posed to regulators," says Dance, who also serves as executive director of the Global Counsel Leaders Circle.

"For legal departments in Europe's larger companies, it's a huge issue," she adds, "and you'll find that all have recently reviewed their scenario planning and taken a hard look at how they can best be prepared for a no-deal Brexit as they hope for better outcomes."



Brexit is an “aggravating topic” for the majority of legal departments outside the U.K., Dance says, “because it will create so much extra work for their companies and nothing has been clear since the referendum vote.”

“Brexit is generally viewed by most global in-house counsel as a lose-lose situation overall and so a waste of busy corporate counsels’ precious time,” she says.

But savvy in-house counsel at companies bracing for negative effects of Brexit could leverage the situation and demonstrate “their value by better identifying and preparing for possible Brexit outcomes and even uncovering competitive opportunities,” Dance says.

For instance, she’s aware of a major U.K.-based company that has considered using what it learned in preparing for Brexit through collaboration involving cross-disciplinary teams to “raise its profile with key clients and position itself higher in their sector globally.”

She notes that it’s important for in-house counsel preparing for the various Brexit possibilities to consider multiple perspectives, including the views of advisers outside the U.K., as their perspectives tend to be “markedly different.”

Based on her discussions with corporate counsel, Dance suspects that U.S.-based “legal departments that have less business in the U.K. and Europe or that have gotten most of their information from the U.K. may be ill-prepared.”

But general counsel of “prominent continental Europe companies” on the other side of the English Channel appear to be far more prepared, according to Dance. She says those GCs have “scenario plans including no-deal Brexit that go back two years.”

“They are ready,” she says.

PREPARING FOR THE UNKNOWN

Galtieri says part of his legal department’s prep work for Brexit included analyzing the company’s supply chain for potential issues that could arise if there were disruptions at border crossings. He adds the company also bulked up its stock of equipment in the U.K.

“If you’re a fast-moving consumer goods company and you have a factory here, but the ingredients you need to make your product are difficult to store, what would happen then?” he says.

In the event of a no-deal Brexit, Britain is expected to become a so-called “third country” under the GDPR, which could stem the flow of data between the U.K. and EU members, the latter of which are not allowed to transfer personal data to countries that are outside the EU and lack adequate data protection.

RELOCATION AND RECRUITMENT WOES

Brexit has prompted some companies and financial institutions, including Sony, Panasonic and Bank of America, to move their European operations outside the U.K. And Whitten, the London-based partner at Sheppard Mullin, is bracing for more departures. He says the “big prediction is that a lot of the high-end clients are going to be gone.”

“The multinationals are just going to re-headquarter,” he says. “If there’s going to be a cost of moving capital from your London branch to Frankfurt, you’re going to want to shift that.”

But for U.K.-based in-house counsel, relocating can be difficult, according to Dance. She notes the U.K. follows a common law legal system, unlike Europe’s other main economies, which are governed by civil law. That fact, when combined with “different currencies, pay scales [and] cultures,” makes it challenging for U.K.-based in-house lawyers to pack up and leave.

“A rough analogy is that if NAFTA disappeared, would in-house lawyers from the U.S. take jobs in Canada or Mexico or vice versa? Unlikely,” Dance says. “There is not much if any movement of corporate counsel due to Brexit uncertainty—an uncertainty likely to continue long after March 29.”

That uncertainty also is having a chilling effect on corporate counsel recruitment in the U.K., says Rebecca Garland, a member of Barclay Simpson’s legal team in London who recruits in-house talent.

“I was much busier this time last year than I am now. Normally, this time of year we would get quite a big

influx of people after the Christmas period wanting to look for a new job,” Garland says. “European candidates are worried to a certain extent because there’s been nothing agreed to yet as to what will happen.”

Garland says many large U.K.-based banks have opened offices in the EU, primarily in Dublin, Frankfurt, Switzerland and Paris, as they prepare for Brexit-related regulatory changes, even though the details of those changes remain murky.

“It’s created a lot of work for contract lawyers,” Garland adds. “Regardless of what happens, I think there are going to be new regulations in place and they’ll have to hire lawyers to put those regulations into practice. From a legal perspective, there will be work coming out of Brexit.”

Meanwhile, as countdown clocks ticked toward the Brexit deadline and rumors swirled about what waited on the horizon, life and business carried on in London, where, Whitten observed, it seemed as if “nothing is going to happen.”

“Business continues in the city and we’ll just have to see if it crashes out,” he says. ■





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PRIVACY PRIORITY

For global general counsel, the importance of international data protection laws is taking center stage.

BY CAROLINE SPIEZIO

DATA PROTECTION IS GOING GLOBAL, WITH STRONGER LAWS AND ENFORCEMENT STRATEGIES in Latin America, Africa and Asia-Pacific. And for compliance, one size doesn't fit all.

Last May, in-house eyes were on the European Union, as companies prepared for the General Data Protection Regulation. The EU's sweeping data privacy law enhanced residents' rights over their personal data, implementing new policies on the right to be forgotten, explicit, informed consent and processor accountability, with fines up to 20 million euros, or 4 percent of global turnover.

The rule's hefty price tag and strong enforcement has, in part, kept in-house focus on Europe. But ignoring data privacy changes outside of Europe, or assuming GDPR policies will comply anywhere, may lead to fines or diminished consumer trust in other regions, lawyers said.

Camila Tobón, a Colorado-based data privacy lawyer at Shook, Hardy & Bacon, said many countries in the Latin America follow a consent-based model, which doesn't allow for the legitimate interest data collection case presented under GDPR. She said many Latin American countries with data privacy laws used Spain's consent-based version of the 1995 Data Protection Directive to shape their regulations.

"When Spain incorporated the directive into their law, one noticeable change [from other EU countries] was the lack of legitimate interest for a basis for processing personal data," Tobón said. "When most Latin American countries were starting to implement their laws in 1999, 2000, 2001, they used the Spanish law as a model, which didn't include legitimate interest. So what you ended up seeing in Latin America was a consent-based model."

ALENGO/STOCKPHOTO.COM

**BIG CHANGES IN BRAZIL**

That's no longer the case for all countries in the region.

Brazil's General Data Protection Law, which passed in 2018, includes the case for legitimate interest collection. The regulation closely aligns the country's laws with Europe's. In-house counsel in Brazil said it's a massive change, especially for non-multinational companies.

Álvaro Felipe Rizzi Rodrigues, a legal director at Itaú Unibanco in São Paulo, said the introduction of legitimate interest led his in-house team to review the whys and hows of all their data collection, a process that's still ongoing. He said it's taken a fast-moving, large, multi-department team to review and adapt his company's data collection practices to meet new compliance standards.

"You have to review all your processes and check if you indeed need all the data. And you not only need to have a purpose to hold and to use the data of the clients, but you have to tell the clients [the purpose of] the data use," Rodrigues said.

Valéria Camacho Martins Schmitke, the Latin American regional general counsel for Zurich Minas Brasil Seguro in São Paulo, said Brazilian in-house counsel are also concerned with ensuring third-party data processors and distributors are secure. Additionally, many companies use "non structured data," which she said can complicate deleting information and complying with the right to be forgotten.

There's also a chance that the law could change, depending on regulators, Rodrigues said.

"We have this deadline of August next year, but we do not know all the rules that we will need to comply [with]," Rodrigues said. "This is also a concern. At a certain point, I hope this year, we will face additional rules related to the law. And we'll have to, if necessary, start again this review process to be in compliance with these specific rules."

LATIN AMERICA GETS NEW REGULATIONS, STRICTER ENFORCEMENT

Brazil's not the only country seeing change. Schmitke's eyes are on Chile, which recently voted to create a national data protection authority. Panama's National Assembly approved a national data protection regulation last year that currently awaits the president's signature.

An updated Argentine bill is also in the works, with a draft standing in front of Congress. Argentina's proposed changes would bring the country's data protection regulations closer to Europe's with a legitimate interest model and data protection officer requirement, said Diego Fernández, a privacy lawyer at Marval, O'Farrell & Mairal in Argentina. The draft also states minors need an adult guardian's sign-off to consent to data collection.



"You can't just say, 'I comply with GDPR, therefore I comply with Australian law.'"

Lyn Nicholson

Fernández said the chances of Argentina passing the bill will be clearer after the country's election in October. But there is pressure for stricter regulation as Argentina strives to maintain its status as an "adequate" data transfer country from the EU.

"We still are adequate because that decision has not been reversed, but the truth is we have not been analyzed under the GDPR. So if that was to happen, we might lose the adequacy," Fernández said. "So that's why we are pushing the law as fast as we can."

The GDPR-adequate non-EU countries are, as of February: Andorra, Argentina, Canada (organizations subject to the Personal Information Protection and Electronic Documents Act, only), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay and the U.S. (processors in the EU-U.S. Privacy Shield).

Other countries in Latin America haven't changed their laws but have kept enforcement strong.

Rosa Maria Franco Velázquez, the managing director of the International Association of Privacy Professionals in Latin America, and head of privacy and data protection practice of Axkati Legal in Mexico City, said Mexico's data privacy law isn't set to see change in the very near future.

But the country's data protection regulators have remained active, issuing fines and, she said, "working hard to enforce the law" and increase awareness around privacy concerns. Mexico's law requires controllers issue a privacy notice and obtain consent.

Colombia's Superintendency of Industry and Commerce cracked down on data privacy violations in February, when it ordered Facebook to strengthen its data security measures over the next four months, or risk government investigation in the country.

Danilo Romero Raad, a Bogotá-based Holland & Knight partner who focuses on data and privacy, said the action against Facebook signals a stronger emphasis on preventing data privacy issues in Colombia.

"That's good. It's not because they have a penalty against Facebook," Raad said. "It's an important message to the market that data protection is important and [regulators are] taking care of that."

Representatives from Argentina and Brazil attended a November hearing in London where nine countries' leaders pressed Facebook's vice president of public policy for Europe, the Middle East and Africa, Richard Allan, on the platforms' efforts to boost data privacy and curb election interference, with some representatives calling for stricter regulation.

While regulations vary by stage, severity and model in each Latin American country, lawyers said much of the region is headed to a new era of data privacy.



"This is definitely 'the' matter in Latin America in terms of regulation," Schmitke said in an email.

AFRICA MOVES TOWARD STRONGER REGULATION

Laws aren't just changing in Latin America.

Inside and outside counsel in Africa are also watching debates on data privacy. The Corporate Counsel Association of South Africa's chief executive officer Alison Lee said she expects to see the country implement the Protection of Personal Information Act this year.

Unlike GDPR, POPIA asserts companies also have "personal data" that requires protection. South Africa currently doesn't require explicit consent to collect data or legitimate interest, but it does require some form of consent.

"Every year we've been expecting it to come in and it hasn't. But I think because the regulations have now been finalized and they have established the regulators office, I do believe the act will come in the next six months," Lee said. "The advice is [in-house counsel] should start looking at data impact assessments because it does take some time. It's not something you can do overnight."

Livia Dyer, a partner and co-head of technology, media and telecommunication at Bowmans Law in Johannesburg, said that in South Africa GDPR compliance is a good place to start preparing for POPIA's implementation.

Nigeria could also see data protection changes. Iheanyi Samuel Nwankwo, a research assistant at the Institute of Legal Informatics of the Leibniz University of Hannover at the Law School of the University of Hannover who has focused on Nigerian privacy law, said Nigeria has long attempted to pass a specific data protection bill. That effort has been complicated by Nigeria's presidential elections in February, as the bill needs sign-off from the country's president.

Regardless, Nigeria's constitution protects citizens' right to privacy, and companies violating that right or one of the country's data-related laws can face fines. Mali, Côte d'Ivoire and some other West African countries have already established data privacy and protection laws.

APAC IS CHANGING BUT KEEPS FOCUS ON CONSENT

Since GDPR's implementation, Scott Thiel, a Hong Kong-based DLA Piper partner, said he's increasingly asked questions about data protection in Asia.

"Everyone is sort of finally taking a breath and going, 'OK, we got through GDPR, we're somewhere near compliance and that's great. I assume that works everywhere, does it?' And the short answer is no, it doesn't," Thiel said. "A lot of

the approaches to data compliance that work in Europe don't work in the Asian markets."

He said many companies have tried applying their GDPR policies to China and other Asian countries and it "just doesn't" work.

Like Latin America, much of East Asia relies on a consent-based model rather than legitimate interest, Thiel said. That means companies relying solely on GDPR methods to comply in every country may forego asking the consent required, instead assuming they can cite legitimate interest.

"[GDPR] has done away with consent as the fundamental basis for compliance. And that's great...but the problem is in Asia we haven't moved away from consent," Thiel said. "Consent is still the most common basis for getting yourself compliant in local markets, and China is the one that is perhaps most relevant to a lot of U.S. corporate counsel. In Europe, it's about avoiding asking for consent and trying to establish a legitimate interest."

Cybersecurity laws are also changing in APAC.

Singapore created a cybersecurity regulator, implementing its Cybersecurity Act 2018. In January 2018, the Standardization Administration of China published the full text of the Information Security Technology - Personal Information Security Specification, a set of best practices to ensure compliance with the country's cybersecurity law.

The specification calls on companies to get consent before collecting data, but Xiaoyan Zhang, counsel in Reed Smith's IP, Tech & Data Group's San Francisco office, noted in February 2018 it is not clear how explicit that consent must be.

Lyn Nicholson, a Sydney-based general counsel at Holding Redlich, said Australia's mandatory data breach reporting rules and controversial encryption law stirred data privacy discussions in the country last year. Still, she said, many international companies in-house counsel were focused on Europe and GDPR.

While that makes sense, she said, given the high fines and compliance complications of the EU's law, Nicholson has seen companies attempt to apply GDPR-like standards to their Australian privacy policies. Australian and EU privacy policies have similar requirements, she said, but not identical—and regulators can tell when in-house counsel haven't read the country's law closely.

"You can't just say, 'I comply with GDPR, therefore I comply with Australian law,'" Nicholson said. "Because the Australian regulator will want to see that you've looked at all of our particular rules. And they are framed differently. ... It's similar, but it's not identical." ■



Argentina's proposed changes would bring its regulations closer to Europe's.

Diego Fernández



COMBATING CORRUPTION

Where democracy stumbles or never existed,
does corruption flourish?

BY SUE REISINGER

TRANSPARENCY INTERNATIONAL SAYS THE CONTINUED FAILURE OF most countries to significantly control corruption is contributing to a crisis in democracy around the world by creating a vicious cycle, where corruption undermines democratic institutions and, in turn, weak institutions are less able to control corruption.

The group's annual Corruption Perceptions Index, a sort of annual snapshot of the relative degree of perceived global corruption, ranks 180 countries and territories from 0 at highly corrupt to 100 at very clean. The report says this year more than two-thirds of the countries scored below 50, with a global average score of 43.

Delia Ferreira Rubio, chair of the nonprofit global organization based in Berlin, said in a statement, "Corruption is much more likely to flourish where democratic foundations are weak and, as we have seen in many countries, where undemocratic and populist politicians can use it to their advantage."

The democratic Nordic countries of Denmark, Finland, Sweden, Norway and Iceland are the rock stars of anti-corruption. Four of them ranked in the top 10 of the least corrupt countries, and Iceland ranked in the top 20.

The countries on this list that will worry every general counsel and compliance lawyer whose company wants to do business there were North Korea, which scored a 14; Yemen, South Sudan, Syria and, dead last, Somalia at a lowly 10.

Transparency International's analysts defined a democracy as having free and fair elections, allowing for political participation, recognizing civil rights and having a robust system of checks and balances on government.

Their analysis said, "Over the past two decades we have witnessed democratic backsliding across the world, including in what were promising new democracies such as Turkey, Hungary and Poland, and [even] in countries which were considered to be fully functioning democracies like the U.S."

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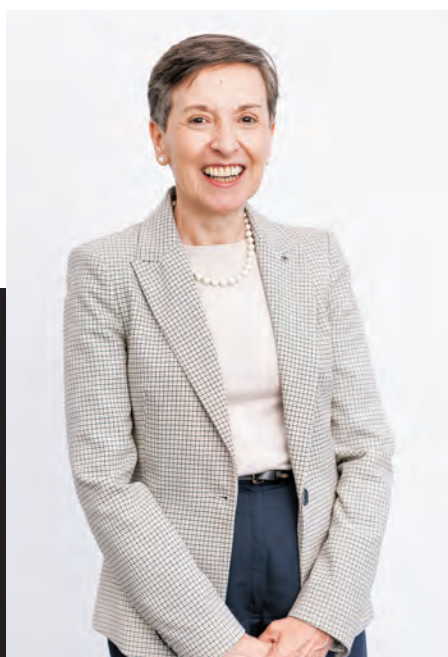
The U.S. dropped this year from the top 20 best countries to No. 25. “The low score comes at a time when the U.S. is experiencing threats to its system of checks and balances alongside an erosion of ethical norms at the highest levels of power,” the analysis said.

According to the organization, full democracies score an average of 75 on the index, while flawed democracies score an average of 49, and autocratic regimes perform worst, with an average score of 30.

It is not alone in perceiving trouble with democracies. It cited *The Economist*, a London-based news magazine, which published an annual democracy index showing democracy stagnating in 2018 after three consecutive years of deterioration.

It also cited Freedom House, a U.S.-based watchdog group, whose annual *Freedom in the World* report shows substantial net declines in the health of democracies worldwide. Freedom House found that since 2006, 113 countries have seen a net decline in their aggregate score, while only 62 have experienced a net improvement.

Delia Ferreira Rubio,
chair of Transparency
International, a nonprof-
it global organization
based in Berlin.



The Transparency International report said no full democracies scored below its index average, and fewer than 10 countries classified as hybrid regimes or authoritarian regimes scored above the average. The study found “a strong and statistically significant effect of corruption on democracy.”

The analysts said statistical models were not sufficient to explain whether corruption leads to democratic decline or whether democratic decline leads to more corruption. “However, they are indicative of the very strong association between the two variables,” they added.

Among governments listed as increasingly corrupt in 2018 were Turkey, Hungary, Venezuela, Guatemala and the U.S. “We should also closely watch the new populist governments in Italy, Brazil and Mexico,” the organization said.

Not everyone agrees with this analysis. For example, Alexandra Wrage, head of Annapolis, Maryland-based TRACE International, questions the correlation between declining democracy and corruption.

“As much as we may value the foundations of liberal democracy—including the principles of governmental transparency and press freedom—we shouldn’t assume those values will always translate into less corruption,” Wrage says.

She compared the index’s rankings with those of the most recent Press Freedom Index published by Reporters Without Borders.

“Although there’s a cluster of countries in which minimal corruption and extraordinary press freedom go hand-in-hand, the actual overall correlation between CPI scores and PFI scores is only around 0.6,” Wrage says. “So while the two phenomena aren’t entirely unrelated, corruption is much too complex to be reduced to any single factor.”

Wrage acknowledges that the Nordic countries of Denmark, Finland, Sweden, Norway and Iceland always score at or near the top of the Corruption Perceptions Index. “But they have other characteristics in common that also contribute to their comparatively high standing: efficient government administration; robust enforcement mechanisms; and a well-developed set of normative expectations. Countries that share these characteristics are also likely to be considered less corrupt, even under a more authoritarian political system—Singapore, for example.”

Wrage’s anti-corruption group issues its own annual anti-bribery index, called the TRACE Matrix, which attempts to identify the different types of corporate corruption risks in different countries. She says she works “to avoid the tendency to assume that cultural or political elements that we like always correlate with transparency.”

For example, she says, “A thuggish dictator determined to reduce corruption could almost certainly do that more efficiently than a fledgling democracy.”

Both groups work to help curb corruption around the world. For its part, Transparency International calls on all governments to:

- Strengthen institutions and preserve checks and balances.
- Close the implementation gap between anti-corruption legislation, practice and enforcement.
- Empower citizens to hold governments accountable.
- Protect press freedoms and journalists.

Wrage’s TRACE, on the other hand, aims for a more pragmatic response to the complex problem. Her group helps corporations to identify, and then avoid or reduce the risk of corruption by focusing on particular risks in specific regions.

Wrage agrees that “corruption is an old and stubborn problem, corrosive in its impact on both institutions and individuals.” ■



RISK V. REWARD

Could Venezuela sanctions bring new opportunities for U.S. businesses?

BY PHILLIP BANTZ

AS SOME U.S. COMPANIES ANTICIPATE A coup in Venezuela, which could open the door for new business opportunities, others are screening their transactions for potential sanctions-related risks, international trade lawyers say.

Early this year, the U.S. announced it would impose new sanctions on Venezuela's state-owned oil company Petróleos de Venezuela SA, or PDVSA, the parent company of Citgo and several other subsidiaries, as part of an effort to pressure Venezuelan President Nicolas Maduro to resign.

"I will continue to use the full weight of United States economic and diplomatic power to press for the restoration of Venezuelan democracy," President Donald Trump said in a Jan. 23 statement in which he recognized opposition leader Juan Guaido as Venezuela's interim president.

The latest sanctions, which are set to take effect April 28, make PDVSA a Specially Designated National, which means its assets are blocked and U.S. residents are generally prohibited from dealing with the company. The sanctions would prevent Maduro's regime from benefiting from the proceeds of PDVSA's exports of crude to the U.S., and prohibit American firms from exporting goods or services to PDVSA.

Venezuela's oil revenues account for 98 percent of export earnings, according to OPEC, and the sanctions could shove the country's already fragile economy over the brink.

"Corporate clients and persons, including my neighbors, some of whom recently arrived in South Florida from Venezuela, are enthusiastic that there will finally be a change in the leadership of what is widely recognized as a failed and corrupt government in Venezuela," said Miami-based lawyer Peter Quinter, a shareholder at GrayRobin-



son who chairs the firm's customs and international trade law group.

Business transactions between the U.S. and Venezuela have "drastically fallen over the last 10 years," added Quinter, who said the "sooner there is a change in the government in Venezuela, the sooner the international business will return, especially for the benefit of companies located in South Florida."

Jorge Salcedo, a Miami attorney who represents domestic and international businesses, also said his clients, who operate primarily in the aviation and energy industries, have "good hope that there's going to be a regime change very soon" so they can "start doing business in Venezuela freely." But if that change doesn't come, Salcedo predicted, "you'll be looking at a very complex situation where I don't think there will be an appetite from foreign investors to touch Venezuela at all."

Ama Adams, a partner at Ropes & Gray in Washington, D.C., has been having a different Venezuela-related conversation with her clients, which include energy companies, financial service providers, and real estate and construction businesses.

A man holds a sign that reads in Spanish, "They attack for oil," during a march in support of PDVSA in Caracas, Venezuela, on Jan. 31, 2019.

Many of the companies that she advises are considering whether they have risks associated with sovereign wealth debt issues connected to the U.S. sanctions on Venezuela. She added her clients are "looking at various counterparty relationships to see if they can continue ... and if there are any subsidiaries that PDVSA might own overseas or in the U.S. that could be impacted."

While Salcedo and Quinter said their clients were eager for a regime change in Venezuela, Adams said her clients are simply hoping for a resolution that will lift the sanctions impacting a range of industries.

Until that happens, those businesses are going to have to be vigilant about risk and compliance screening.

"[The new sanctions] now require companies to really look at their transactions and dealings with PDVSA," she said.

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THE RISING TECH TIDE

Australia's legal tech scene is making waves.

BY ZACH WARREN

WHEN JODIE BAKER MOVED FROM KANSAS CITY BACK TO MEL-bourne, Australia, in 2012 to join law firm Hive Legal, she began internally developing a technology that would become matter management platform Xakia Technologies. She took Xakia out on its own in mid-2016, only to find an undeveloped local legal technology market.

"When I started Xakia in 2016, I looked around and thought there wasn't really any ecosystem for legal technology in Australia," Baker says. "I was actually disappointed; I felt so out on a limb."

Just three years later, the legal technology ecosystem in Australia has exploded. For starters, the Australian Legal Technology Association (ALTA), of which Baker is deputy chair, was founded in 2017 and has created a central meeting place for both new start-ups and established companies to convene and strategize with one distinct goal: to grow Australia's legal technology provider community.

But it's not just vendors; there's also a growing acceptance of legal technologies in the overall legal marketplace. There's the rise of corporate legal operations among some of Australia's largest companies, evidenced by the Corporate Legal Operations Consortium (CLOC) holding its first Australian event in late 2018. A number of Australian firms have been innovators in the past three years with artificial intelligence, data analytics, and other new technologies. Even courts and law schools are getting in on the game.



What it means is that globally, tech-savvy law firms and corporate legal departments are going to start hearing from their Aussie counterparts more and more as the country grows into an international legal tech player.

AUSTRALIA'S DATA EVOLUTION

Just as in other countries, the focus on Australian legal technology has largely stemmed from an increase in data—both in number of data sources and in the sheer amount of data collected by law firms and corporate legal departments alike.

But while the U.S. focus on data in the courtroom has been evident since rulings like 2012's *da Silva Moore*, the first ruling of its kind in Australia's courts did not occur until 2017's *McConnell Dowell v. Santam*, where a document set numbering around 4 million in total led then-Supreme Court of Victoria Justice Peter Vickery to order technology-assisted review (TAR) in the case.

Speaking with Legaltech News today, Vickery, now acting as an independent arbitrator and mediator, says that litigants in Australian courts face “nothing less than a document tsunami upon us.”

“From my observations of trends in this area, the local marketplace in Australia appears to be growing to embrace the new technologies,” Vickery says. “I would say there are two main drivers behind this development: First, the necessity spurred by the need to manage large and growing volumes of ESI [electronically stored information], and second, because of the growing availability of new technologies and efficient technologies such as big data analytics which are being developed to manage ESI.”

“The principal catalyst for the development of TAR has been necessity,” Vickery adds. “The wisdom enshrined in the English-language proverb ‘necessity is the mother of invention’ rings true. The primary driving force has been the sheer volume of documents generated by computers on a daily basis in large enterprises or in the course of large commercial or development projects. The volumes are unprecedented and in some cases are staggering.”

Indeed, data is at the center of why many legal technologies have exploded worldwide. Unlike the U.S., though, many of Australia's legal technology companies do not traffic in e-discovery, at least directly. Instead, notes Julian Uebergang, the focus has been on data in a different way—through analytics insight and increased collaboration.

Today, Uebergang is the managing director of APAC for AI-focused legal tech company Neota Logic, but in a past life



he worked in the e-discovery industry. He says that he sees a lot of similarities between the maturing of the early U.S. e-discovery market and newer Australian legal technologies—where the focus has been on new technology, but “not necessarily the facilitation of exchanging of data.”

Uebergang explains, “We hear a lot about AI and blockchain, and they’re the technologies, but ultimately it’s about accessing the data and providing solutions around that data. ... When the focus changes from technologies to data, we’ll see some really sophisticated strategies around delivering our solutions.”



“... [T]hree years ago, the idea of having an innovation manager didn’t exist.”

Julian Uebergang

This evolution may already be underway, with law firms like Corrs Chambers Westgarth taking the lead. An international law firm of 600+ attorneys based in Sydney, Corrs has been aggressive in recent years with implementing new technologies, ranging from bringing in AI tool Luminance to assist with property due diligence and M&A due diligence transactions, to developing internal platforms like CorrsEdge to assist document production, to even creating a dedicated client technology solutions team.

But to hear Corrs director of technology Berys Amor tell it, the focus of all of these initiatives isn’t new technology for technology’s sake. It’s to apply data in a way that makes a distinct difference in the firm’s operations.

“These business applications are disrupting the legal marketplace by providing enormous value in the form of intelligent and efficient process automation for our clients,” she explains. “They are actually integrating Corrs into our client’s legal practice and value chain, providing the systems and tools to support our client’s day-to-day activities. Through responsive dashboards, our clients have access to secure platforms that streamline and automate everyday processes to drive efficiencies. Our clients are using these solutions to take repetitive tasks away from their employees and members of their legal team, freeing them up to focus on more meaningful work.”

CORPORATE CATCHING UP

This explosion of data and development has expedited the need for a new innovation structure in Australia’s legal world. Uebergang says law firms like Corrs have primarily taken charge in Australia, developing sophisticated innovation arms in a short period of time.

“Even when I started three years ago, the idea of having an innovation

manager didn’t exist, just didn’t happen,” he adds. “Innovation was an annual discussion, or a lunchtime discussion, where now we’re seeing it with full-time roles, and at all levels.”

Notably absent, though, are corporate legal departments. The corporate legal ops segment is tangible, notes Uebergang, but still in its infancy. “We just haven’t hit that level of maturity as the U.S., which is interesting, because everything I see from a law firm and a technology perspective is pretty comparable to what’s happening elsewhere in the world, but for whatever reason the legal ops function just hasn’t evolved quite as quickly.”

The numbers back him up. The Australian Legal Department Operations Survey 2018 from CLOC, Gen2Law and HBR Consulting, found that of the 17 companies that participated, more than half had just one legal operations professional. The median for companies in a U.S.-based HBR Law Department survey, meanwhile, was four. And while Australian legal departments were advanced in cross-functional alignment in particular, 41 percent were deemed “under developed” when it came to technology and process support.

Sheldon Renkema, general manager for legal in the corporate solicitors office at Australian conglomerate Wesfarmers, admits, “Australia is generally less mature in legal operations compared with the U.S.” However, this trend has been slowly changing.

“It has been noticeable how many people have been appointed to dedicated legal ops roles in the last year, and I expect that trend to continue,” Renkema explains.

One of the main issues facing increased maturity is simply one of dollars and cents. He further notes, “The challenge with technology solutions is that many are expensive and it can be difficult to secure support for it at a



time when there is significant pressure on the costs of the legal function.”

But legal ops will get there, he believes—even if not on the same level as the U.S. “In Australia, more people will be appointed to dedicated legal ops roles and the level of sophistication will increase. However, in the same way that the size of corporate legal teams in Australia is much smaller than it is in the U.S., I would not expect legal ops teams to reach anywhere near the size that they are in the U.S.”

FROM OCEANIA TO THE WORLD

But the relative size of the market doesn’t mean that innovation will be stifled. Getting to the next level is simply a matter of education.

In his work surrounding TAR following *McConnell Dowell v. Santam*, retired justice Vickery has seen this need to educate firsthand. He says that a major barrier to innovation still lies in the need to educate clients—“after all, it is the client who is called upon to pay for legal services.”

“Even with the proven efficiency of TAR, the process still involves a significant up-front cost which must be paid for by the client,” Vickery says. “Like any commercial decision, a client will need to be satisfied of the cost/benefit of the process before making a decision to invest in the process. Tools need to be considered and developed to explain these processes to the lay client to reduce the barriers to acceptance.”

The driving force behind this education seems to be coming from new entrants to the legal market. While there are some established companies as part of ALTA, a large portion of the organization’s 40+ members are start-up companies. Uebergang, meanwhile, has been involved for four years with a legal technology project at Melbourne University and four other Australian law schools, where a group of 60

students use technology to solve various access to justice problems.

The result is an increasingly more educated, technology-savvy workforce. Cross-functional skills, he says, are “from a law firm perspective, especially here in Australia, really in demand. So students that have got experience in multiple disciplines or have had experience in a start-up business, from a recruitment perspective that’s what law firms and corporate legal departments are looking for.”

At Corrs, Amor has helped put this new workforce into action: The firm has developed a group of young lawyers from a variety of practice areas to develop ideas and design solutions, with an eye towards maximizing value for the firm. The group, she says, “is also the champion for new technologies and assists with ideas on engagement and adoption of technology across the business.” In her view, cultural change and freeing up lawyers’ time to experiment is the main key towards overcoming barriers to innovation.

That entrepreneurial mindset and willingness to embrace new technologies is something that could lead Australian legal technology to continue its upward trajectory, even as more start-up technology providers enter the space. Even with a population one-tenth of the U.S. and an overall legal market with smaller revenues, there still seems to be space for growth with all.

And that means U.S.-based legal technologists and others from across the world may be interacting more and more with their Australian counterparts. “You can point to a number of hotspots around the world that are doing really exciting stuff, and I think that for Australia is going to be the case, that people recognize there is a quite strong ecosystem here,” Xakia’s Baker exclaims. “It’s not just a profile-raising exercise. It’s that there is quite a lot of strength here.” ■



“Australia is generally less mature in legal operations compared with the U.S.”

Sheldon Renkema



RISK AND BUSINESS

Top tips for in-house counsel on how to identify and manage risk.

BY DAN SANDERS

IN THE CONTEXT OF A BUSINESS, ASK THE lawyers representing the company the following questions:

■ Can you identify the top risks facing the company as well as the strategy to address them?

■ Can you explain the company's approach to risk management?

Some lawyers will know the answers. Many will not. Shouldn't all lawyers be able to answer these questions confidently? Not to pick on the lawyers—if you ask the same two questions to the executive management team or board of directors, I suspect you will get the same variety of answers. We think the executive management team, the board of directors—and most importantly, the lawyers—should be able to answer “yes” to both questions. Moving to a “yes” answer will enable the company's leaders to share a common vision, satisfy more fully their fiduciary and management obligations, and reduce risk (and cost).

PROTECT TOMORROW, TODAY

These three words describe the essence of risk management's mission. Companies strive to protect their tomorrow in a global context that evolves constantly and rapidly, and they must do so in highly competitive and complex markets. Change is constant. Risk is constant. But so is opportunity.

Risk management issues across industries are at an all-time high. Boards, executive management and lawyers should expect “risk” to be an increasingly challenging part of doing business. In a nutshell, good risk management will preserve the company's values, assets and reputation; protect the growth strategy; provide leadership with a common vision of the main risks and actions to mitigate them; and reduce risks and cost.

The question is how? And who?



MAP THE RISKS

The first step is to identify the applicable risk categories. For example, in a manufacturing context: safety, environment, product quality, supply continuity, asset protection, finance, etc. For each category, determine a list of risks in each category. The more the better. Think 10 to 15 risks for each category.

QUANTIFY THE IMPACT

The second step is to quantify the impact if the risk were to materialize. For example, high risk: more than \$50 million and/or material impact on corporate image; medium risk: between \$10-\$50 million and/or some impact on corporate image; low risk: less than \$10 million and no impact on corporate image.

IDENTIFY THE PRIORITIES AND MAKE A PLAN

Using a blend of collected data and professional judgment, identify the priorities. An example we use is to pick the top 15. No need to rank order, just the top 15. Then, pick the top three to five risks to be addressed under the board's supervision and assign an owner. The remain-

ing priority risks can be addressed by management, again assigning an owner for each. You may be surprised how much focus and attention comes with board and management oversight.

BACK TO THE LAWYERS

Prior to becoming Michelin's general counsel, I was responsible for internal audit and risk management. It was a gift, because that context and experience allowed our legal department to orient and prioritize around the strategic risks.

We periodically assessed how much time was being spent responding to client requests versus working proactively to reduce the priority risks. We did the same exercise with our outside partners. Of course it is impossible to eliminate the day to day work, but even slight shifts of resources to the main risks can move the needle.

Dan Sanders is a partner in Nelson Mullins Riley & Scarborough's Atlanta office, where he practices with both the corporate and litigation groups. Contact him via email, dan.sanders@nelsonmullins.com.

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DATA PROTECTION

As more countries seek adequacy decisions with EU, will U.S. get left behind?

BY PHILLIP BANTZ

NOW THAT JAPAN HAS SECURED AN ADE-quacy decision under the European Union's General Data Protection Regulation, opening a channel of free-flowing data between the two jurisdictions, several other countries are expected to follow suit. But the U.S. is not among them.

The European Commission announced in late January that Japan had successfully negotiated the first adequacy decision under the GDPR. The agreement between Japan and the EU created the "world's largest area of safe data flows," according to a statement from European Commissioner Věra Jourová.

"Europeans' data will benefit from high privacy standards when their data is transferred to Japan. Our companies will also benefit from a privileged access to a 127 million consumers' market," Jourová added. "Investing in privacy pays off; this arrangement will serve as an example for future partnerships in this key area and help set global standards."

Under the GDPR, EU member countries are not allowed to transfer personal data to countries that are outside the EU and lack adequate data protection. To secure an adequacy decision under the GDPR, Japan made data protection assurances to the EU and agreed to implement new rules to bring its data protection system in line with the European regulations. Japan also created a framework for handling data-related complaints from Europeans.

Rohan Massey, a London-based partner at Ropes & Gray who leads the firm's privacy and cybersecurity practice, said in an interview in February that South Korea is negotiating an adequacy decision with the EU while India and Mexico have shown interest in doing the same. He expected that Brazil, which passed sweeping data protection legislation last year, also would seek an adequacy decision.



"All these major economic areas are taking an omnibus approach to data protection," Massey said. But he noted that the U.S. hasn't hopped aboard that data protection train and "is still focused very much sectorally on how it regulates data protection."

"The U.S. has been very commercially driven in its approach," he added.

As more countries pass comprehensive data protection laws, the U.S. has continued to follow a segmented approach with specific agencies regulating certain types of data and some states passing their own privacy laws, such as the California Consumer Privacy Act.

A federal data privacy law would open the door for a U.S.-EU adequacy decision under the GDPR. But such a law appears to be a tough sell at the moment.

"The U.S. will not have an adequacy decision until it has a nationwide privacy law, so we're not really in the ballpark to have that kind of [adequacy] decision," said David Peloquin, an associate at Ropes & Gray in Boston who specializes in clinical research and

health data privacy. "The bottom line is we're nowhere close to an adequacy decision in the U.S."

U.S.-based organizations that are ineligible for Privacy Shield certification, including Peloquin's nonprofit clients, typically have to rely on standard contractual clauses to transfer data with the EU, according to Peloquin. He said many of his clients are unable to comply with certain terms found in those contracts.

"The problem with that is that the terms of those contracts require that you, for example, agree to jurisdiction of the European court," he said. "It has really stalled some important research because we're unable to get data transferred from Europe to the U.S."

Peloquin has been considering certain potential solutions to EU-related data transfer headaches, including bespoke contracts that must receive approval from EU data protection authorities. But that route "takes a lot time, like months and months," he said.

"We have this fundamental problem that we're all trying to work around," he added.

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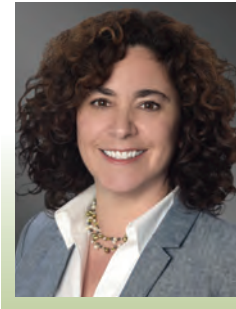


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Ginger is Vice Chair of Greenberg Traurig's Pharmaceutical, Medical Device & Health Care Litigation Practice and helps lead the over 80-attorney team which *The American Lawyer* named 2018 "Product Liability Litigation Department of the Year." Ginger has been recognized as a "Life Sciences Star" by LMG Life Sciences and listed in *The International Who's Who of Product Liability Defense Lawyers*, *The Legal 500 United States*, and *Chambers USA*, including the *Chambers USA "Women in Law Awards."*

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The Law Office of Mitchell J. Howie has been serving clients since 2004 with effective and skilled legal representation. Mr. Howie is a skilled criminal defense lawyer, business lawyer, personal injury lawyer and family lawyer who gets the best possible results for his clients. Mr. Howie still serves in the Air Force Reserves and teaches trial advocacy worldwide for the military. In 2017 and 2018, Mitchell J. Howie was selected as an esteemed lawyer of America, as a Lawyer of Distinction, as one of the Best Attorneys in America, as one of America's Top 100 Attorneys, and was recognized as an AV preeminent attorney by Martindale-Hubbell Peer Review Ratings. The AV Rating is the highest possible rating given by LexisNexis Martindale-Hubbell Peer Review for a lawyer and is established wholly on a peer-review basis. The AV Preeminent designation signifies that Mr. Howie has been rated by Judges and fellow attorneys as having the highest possible rating for legal abilities and ethical standards. Between 2015-2018, Huntsville Attorney Mitchell J. Howie was also selected as a member of the Nation's Top One Percent of attorneys by the National Association of Distinguished Counsel and has maintained a "superb rating" on AVVO. One of the best family lawyers in Huntsville, he was recognized as Top 10 under 40 of Alabama Family Lawyers by the National Academy of Family Law Attorneys. Between 2014-2018, Attorney Mitchell J. Howie was recognized as one of the Top 100 lawyers by the National Trial Lawyers (NTL) and was recognized as one of the Top 40 Lawyers Under 40 by NTL and as one of the TOP TEN Criminal Defense attorneys in Alabama under 40 by the National Academy of Criminal Defense Attorneys for being one of Huntsville's best criminal defense attorneys.



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GROWING IN-HOUSE

ANTHONY JUSTMAN JOINED SONY COMPUTER ENTERTAINMENT AMERICA IN 2007 as a senior corporate counsel with no in-house experience. He's been with the company ever since. Now the vice president and deputy GC at Sony Interactive Entertainment, he grew into leadership roles that require business skills. Corporate Counsel spoke with Justman about his management style, growth as a business leader and advice for lawyers developing in-house. This following has been edited for clarity and length.

CORPORATE COUNSEL: Sony was your first in-house role. Did you have a business sense before you came in-house? If not, how did you develop one?

ANTHONY JUSTMAN: In retrospect, I had the good fortune to take some time from private practice to start my own business in a different field. So when my former boss recruited me for this role I was selling real estate in San Francisco. I had gotten worn out by the litigation thing and I was looking at doing a career in something completely different. I was founding a company with a friend of a friend and was getting that off the ground. Now I look back on that and realize the three years I spent doing that was super valuable to this role, because it helped with that business acumen part of it, that a lot of private practice lawyers don't always get. But there was still a lot to learn.

CC: How did you develop your in-house leadership skills?

AJ: Leadership is something you have to actively cultivate and my analogy there would be my time working at a real estate company. I went from private practice doing complex IP litigation. I thought I was going to walk into real estate and be very successful very quickly. What I learned is that it's mostly a sales job, and that was not a muscle I had exercised much. What I did come to learn was that some people are better at sales than others, but everybody can be effective. You just have to find what works for you. I think leadership is a lot like that. For the vast majority of people, it's about realizing that opportunity is there and stepping into that position of leadership with certain ideas in mind. For me, those ideas have been authenticity, being who you really are, transparency, telling people what you're doing, and in a legal department, the other piece is confidence. It's going to be hard to have a leader in legal who isn't good at some part of law.

CC: What does being authentic mean to you?

AJ: It's about being yourself as a professional. I've always seen myself as very "what you see is what you get." Some people might accuse me of being too frank. But those are traits that are authentic to me. The challenge or the opportunity is how do I leverage that in my leadership role. If I sit down and have a difficult conversation with someone on my team, who wants a promotion they're not going to get, I can get the script from HR and say job done. But that's not nearly as effective as if I put the message in my own words, in a way they would understand is coming from my heart. Because they've had lunch with me, worked with me. If that performance conversation is conveyed in my voice, it's going to be much more effective. They still may not like it. But if I do it in an authentic way, they know I believe it, that I'm not going through the motions, and they're more likely to hear it and come around to acting on it. ■

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