Daniel C. K. Chow (Ohio State University Moritz College of Law)

“China Under the Foreign Corrupt Practices Act”

This presentation will focus on FCPA-related issues that are now arising with increasing frequency that involve multinational companies doing business in China. Many of the recent cases involving the FCPA brought by the U.S. Department of Justice involve China and many more are sure to follow. In-house counsel at multinationals in China (and in the United States) need to be increasingly vigilant about China since there are many historical, cultural, and social norms in China that may encourage or create pressures on companies to engage in acts that may violate the FCPA.

Kathleen G. Cully (Kathleen G. Cully PLLC, New York) and Steven L. Schwarcz (Duke University Law School)

[Coauthors with Shaun Barnes]

“In-house Counsel's Role in the Origination of Mortgage-Backed Securities”

This presentation will briefly introduce the financial crisis and the role played by mortgage-backed securities. It then will describe the controversy at issue: whether, in order to own and enforce the mortgage loans backing those securities, a trust or other special-purpose vehicle “purchasing” mortgage loans must take physical delivery of the notes and security instrument in the precise manner specified by the sale agreement. Finally, the presentation will analyze the extent, if any, that the controversy has merit; whether in-house counsel should have anticipated the controversy; and what, if anything, in-house counsel should have done to mitigate or avert the controversy.

Deborah A. DeMott (Duke University Law School)

“Responding to Scandal: The Position of General Counsel”

This paper examines the roles that general counsel may play in responding to scandals when they occur and in developing policies and procedures prior to any occurrence of a scandalous event. The primary focus is general counsel of a publicly-traded corporation (and possibly large not-for-profit entities). Scandal is not a synonym for crisis (but of course a scandal may or may not represent a crisis); the damage inflicted by a well-publicized scandal may impugn reputation (both that of the individuals visibly involved and the corporation itself) and offend general moral sensibilities in ways that even severe (but non-scandalous) crises do not. General counsel may play several different roles in connection with scandals, prominent among them compliance with the corporation’s reporting obligations under the federal securities laws. Counsel’s position within a corporation’s senior echelons may furnish counsel with deep insights into the corporation’s vulnerabilities and how best to respond to them, but it also suggests potential tensions between natural empathy with individuals with whom counsel works on an ongoing basis and the value of detachment. Additionally, counsel’s position may also imply tensions between the pressures to deal with the immediate perils posed by a scandal and the value of working toward longer-term solutions.
Michael Falk (General Counsel, Wisconsin Alumni Research Foundation)

“Issue Spotting: Helpful and Less Helpful Counseling of Early-Stage Companies”

Michael Falk’s ten years of experience at the Wisconsin Alumni Research Foundation has convinced him that early-stage companies need counsel. His experience has also shown him that companies often do not get the counsel that they need. This presentation will focus on working examples of situations in which counsel has provided significant value to nascent companies on issues related to corporate structure, licensing, business management, and fundraising. Mr. Falk will also discuss examples in which counsel has underserved or over-served company interests, and highlight what he believes good practice is for both clients and attorneys when entering such a relationship.

Cynthia M. Fornelli (Center for Audit Quality)

“In-house Counsel and the External Auditors – a Powerful Alliance”

In our complex and evolving regulatory environment, the presentation of information in the annual report, including financial statements, raises significant accounting and legal challenges that involve the exercise of judgment in a range of areas. Management, the board and audit committee, counsel and the external auditors must work together to assure that the most important information is clearly presented to users of annual reports and that accounting and disclosure practices are of high quality. Moreover, all involved in the financial reporting process share responsibility to deter and detect fraud. Improving communication and coordination between counsel and the external auditor as well as other parties creates a more powerful and effective risk detection program. Ms. Fornelli will discuss these issues and present a range of sound practices that can improve the effectiveness of counsel in the financial reporting process.

Lawrence A. Hamermesh (Widener University School of Law)

“Who Let You Into the House?”

Sarbanes-Oxley and Dodd-Frank both included measures seeking to promote better monitoring of management by moving responsibility for selecting and supervising the monitor (the outside auditor and the compensation consultant, respectively) from management to a committee of independent directors (the audit committee and the compensation committee, respectively). This paper examines whether a similar approach to the selection and supervision of general counsel would positively or negatively affect general counsel’s performance and contribution to the welfare of the firm.

R. Thomas Howell, Jr. (American Bar Association)

“Changes in In-house Practice”

In-house practice settings vary widely. This presentation will discuss several variables that determine the nature of in-house practice, including size of the legal department, industry, organization and reporting relationships of legal function, entity risk appetite, and budget. Based on Mr. Howell's experience in multiple practice settings, his presentation will explore the both the constants and the changes, and the likelihood of continued change. After graduating from the University of Wisconsin Law School in 1967 and serving in the Army, Mr. Howell practiced law with two law firms, served as General Counsel to two large organizations – Quaker Oats and the American Bar Association – and served as acting General Counsel at two smaller companies while with a law firm. He will discuss the the ways in which technology has changed the way attorneys practice, the increased respect and responsibility given to in-house counsel, the tendency to treat outside counsel like “just another vendor”, the rising importance of ethics issues for in-house counsel, specialization, and in-house lawyers as defendants. The presentation will emphasize the importance of discerning the relevant patterns and trends so that attorneys can understand how best to serve the legal needs of their clients as in-house lawyers in the future.
Darian Ibrahim (University of Wisconsin Law School)

“How Do Start-ups Obtain Their Legal Services?”

This presentation will empirically examine the use (or non-use) of in-house counsel by venture capital-backed start-up firms, and, drawing from economic and other social science theory, compare in-house attorneys, traditional law firms, and innovative hybrid firms as alternatives for serving start-up legal needs.

Mike Koehler (Butler University)

“Revisiting An FCPA Compliance Defense”

During this era of the FCPA’s resurgence, most FCPA enforcement actions are based on the conduct of a single employee or small group of employees acting contrary to the company’s pre-existing FCPA compliance policies and procedures. While the existence of such policies and procedures are relevant to charging decisions under the Principles of Prosecution for Business Organizations and relevant to the ultimate fine amount under the U.S. Sentencing Guidelines, the FCPA should be amended to make a company’s pre-existing compliance policies and procedures relevant as a matter of law.

Amending the FCPA to include a compliance defense (a defense found in the “FCPA-like” laws of other peer nations) will best incentivize corporate FCPA compliance and not put a company at risk of FCPA scrutiny, costly FCPA internal investigations, and the growing collateral consequences of FCPA inquiries should a non-executive employee engage in conduct contrary to a company’s pre-existing FCPA compliance policies and procedures and compliance culture.

Donald C. Langevoort (Georgetown University Law Center)

“Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis”

This presentation will offer a description of how people can misperceive reality under certain conditions, and how this might explain lawyers “missing in action” in the events leading up the financial crisis. More generally, this presentation will pose the question of what kinds of behavioral traits are associated with competitive success as an in-house lawyer, where the client is itself driven by hyper-competitive economic pressures.

Gail A. Lione (Retired Executive Vice President and General Counsel, Harley-Davidson, Inc.)

Keynote Address: “A View from the Outside: Progress and Partnerships”

Sida Liu (University of Wisconsin)

“In-House Counsel in State-Owned, Foreign, and Private Enterprises in China”

This presentation discusses the historical development and current status of in-house counsel in different sectors of the Chinese economy, including state-owned enterprises (SOEs), foreign companies, and private enterprises. While in-house counsel in SOEs has been separately licensed from lawyers by the Chinese government since the 1980s, their counterparts in foreign and private enterprises are not directly regulated by the state and mostly recruited from the profession of lawyers. In-house legal departments in SOEs are embedded in the bureaucratic structure of the enterprises and therefore they are often less influential in managerial decision-making than in-house counsel in foreign companies. Many private enterprises in China do not employ in-house counsel or use part-time lawyers to serve as their general counsel. Overall, the mobility of in-house counsel across enterprise types is still limited and their career trajectories are fast changing and diverse.
Larry E. Ribstein (University of Illinois College of Law)

“In-House Counsel and Law’s Information Revolution”

This presentation will analyze in-house counsel’s emerging role as key players in managing the transition from the client-oriented practice of law to legal information products, and some potential implications of this development for the role of outside counsel.

Steven L. Schwarcz (Duke University Law School) and Kathleen G. Cully (Kathleen G. Cully PLLC, New York)

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“In-house Counsel's Role in the Origination of Mortgage-Backed Securities”

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William H. Simon (Columbia Law School)

“Is There a Quality Movement in Law?”

Medicine and other service professions are undergoing restructuring as a consequence of developments often referred to as “quality” movements. The key features of such movements are continuous measurement of the efficacy of practice, standardized work, root cause analysis, and peer review. This presentation will consider the extent to which comparable developments are occurring in law and conclude that they are considerably more limited there than in other professions. The presentation will then speculate on the causes of and possible cures for these limitations.

Andrew Brady Spalding (Chicago-Kent College of Law)

“The Impact of FCPA Enforcement on Business Practices in Developing Countries”

This paper and presentation will explore the impact of FCPA enforcement on the business decisions of U.S. companies in regard to developing countries. It will raise three interrelated questions: 1) what impact does the FCPA have on the decision of whether to do business in relatively corrupt countries, sectors, or projects? 2) how do U.S. companies behave differently than companies from countries that do not have effective anti-bribery laws? and 3) what is the likely impact of these differences on the legal and economic development of developing countries? Drawing on available empirical evidence, as well as the observations of audience members, it will explore the extent to which FCPA enforcement results in a decrease in investment in developing countries, and if so, whether that decrease ultimately benefits, or harms, the countries in which U.S. companies would otherwise do business.

William C. Stone (Outside GC LLC)

“The Rise of Entrepreneurial ‘Outsourced General Counsel’ Firms”

I. The last decade has seen the rise of a new type of legal services firm, providing "outsourced general counsel." This is one emerging legal practice innovation among several, including legal process outsourcing, offshoring, the rise of alternative billing arrangements, refinement of the legal temp/staffing business

II. Defining and distinguishing ‘Outsourced General Counsel’ Firms
- Senior counsel, with in-house experience
- Available part-time or on-demand
- Part of an organization (distinguished from individual former GC for hire)
- Temp agency vs. true outsourced GC firm

III. Role of On-Demand GCs
- Functions, limitations, benefits
- Industries embracing the model
- Acting as “GC” vs. plugging into a corporate in-house department

IV. Example firms and variations on the theme
- Quick review of some example firms around the US and abroad
- Outsourced General Counsel Services Alliance - a nascent trade group

V. Ethical considerations
- Applicability conflict rules (imputed conflicts)
- Confidentiality
- Multi-jurisdiction practice issues

VI. What the emergence of these firms means for the legal profession generally and “on-demand GC” as a new, flexible career path

Eli Wald (University of Denver Sturm College of Law)

“In-House Counsel, Diversity and Discrimination”

For large law firm attorneys, the meaning of “going in-house” has changed dramatically over the last fifty years. Becoming in-house counsel used to evoke a negative connotation, associated with failing to make partner at a large firm, diminished professional status, more clerical and less challenging quality work, and reduced pay. As the role of in-house counsel changed within corporate entities and vis-à-vis outside counsel, so has its perception among lawyers: in-house counsel positions are increasingly understood not as consolation prizes for failing to make partner but as desirable and prestigious lateral moves offering an attractive mix of professional status, competitive pay, and a better work-life balance.

In theory, for women and minority lawyers at large law firms, in-house counsel positions represent not only the promise of an alternative less stressful career path, but also a better shot at professional equality. At large law firms women and minority lawyers face the glass ceiling effect and are systematically and significantly under-represented at the partner levels, especially as powerful partners (equity and management positions). In-house counsel positions offer the promise of greener pastures because many of the documented reasons for inequality at large law firms - the increasingly demanding and rigid time commitment tied into the billable hour method, the expectation of becoming a rainmaker and developing business, the inherent yet implicit reliance on increasingly harder to come by mentoring and training - are missing from the in-house landscape, holding a promise for an equal professional playing field. Moreover, in recent years large corporations have been in the forefront of pushing for diversity, and one might expect the commitment to apply to the entities' in-house lawyers as well.

As it turns out, however, in-house counsel positions may not be a professional haven, not for lawyers seeking a more balanced work-life environment, and not for lawyers seeking diversity and equality in the workplace. Rather, available empirical evidence suggests that the same patterns that characterize the experience of women and minority lawyers at large law firms and in the legal profession more generally, namely, increased participation and representation overall coupled with stratification, under-representation in senior and powerful positions, over-representation in lower-end positions and pay inequity, seem to also apply to their experience in-house. This article studies diversity and discrimination in in-house legal departments, presenting and exploring the available empirical research. Its main goal is to explain the emerging patterns of inequality and under-representation of women and minority lawyers in in-house counsel departments.
David Wilkins (Harvard Law School)

Keynote Address: “Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market.”

Session Presentation: “Is the In-house Counsel Movement Going Global? Assessing the Role of Internal Counsel in Emerging Economies”

Abstract:

In 1989, the American legal Scholar Robert Eli Rosen wrote an influential article chronically the dramatic growth in the size, prestige, and influence of internal legal counsel in large US corporations. In less than 20 years, these lawyers had gone from a position of marginality and subservience - think "house counsel," as in "house pet" - to being "General Counsel," playing a pivotal role in both defining and serving the legal needs of their powerful corporate clients. As Rosen noted, this "in-house counsel movement" - a movement in which internal lawyers themselves played a key role in furthering their growing economic power and professional standing - was in turn producing an important transformation in the structure, norms, and practices of the bar as a whole. In the more than two decades since Rosen's article, the power and prestige of in-house lawyers in the US has only continued to grow. Indeed, many top internal lawyers have traded in the legal sounding title of "general counsel" for the more corporate sobriquet Chief Legal Officer or CLO in order to clearly signal that they are a part of the "C" suite of top executive officers in the company.

Although the in-house counsel movement has therefore been remarkably successful in the US, until quite recently the status of internal lawyers in most other jurisdictions remained similar to what it had been in the US during the 1960s. Since the turn of the twenty first century, however, there are a number of signs that the in-house counsel movement has come to the UK and Western Europe. Given these trends, it is worth asking whether even the degree of power and prestige achieved by GCs in Europe is likely to spread to other important emerging economies in the coming years.

This paper, which is part of a larger research project that I help to coordinate on Globalization, Lawyers, and Emerging Economies (or GLEE as we like to call it), begins to answer this question by identifying the processes of globalization - economic globalization, globalization of knowledge, and globalization of governance - that are likely to foster the development of an in-house counsel movement in emerging economies such as India, China, and Brazil. Although none of these forces guarantee that emerging economies will develop sophisticated in-house capacity, let alone that the GCs they do produce will look like their US counterparts, the processes of globalization already appear to be changing the role and function of in-house lawyers in all of these countries. Specifically, the paper identifies five related aspects of the structure and work of internal counsel - size,credentials, and demographics; relationship with outside counsel; professional standing and mobilization; internal standing, mobility, and responsibilities; and participation in national and international policy, and commitment to the "public interest" - that will provide important clues about the extent to which the in-house counsel movement is indeed reshaping the role of internal counsel - and the overall market for legal services - in these important new economies.
Most enforcement actions brought against firms under the U.S. Foreign Corrupt Practices Act (FCPA) are resolved via a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA). But before federal regulators will consider negotiating over these types of settlement vehicles, they typically weigh a firm’s willingness to cooperate with the underlying investigation. Cooperation in this vein often means indentifying individual agents responsible for the alleged wrongdoing, and, in some cases, terminating them or imposing other forms of internal discipline. Once they are identified or cut loose, individual agents then face the possibility of indictment in a separate FCPA prosecution.

This paper looks at the effects on corporate governance and internal relations that arise from this dynamic. It shows how a firm’s decision to “sacrifice” or sanction individual agents in order to secure an FCPA settlement can lead to feelings of distrust and disloyalty between agents and corporate counsel, a breakdown in communications and transparency, and undesirable risk-aversion. These issues are of particular concern in the FCPA context due to the statute’s many vague provisions, the transnational nature of the underlying conduct, and the often-blurry lines between permissible competitive activity and impermissible bribery. Though many firms may ultimately decide that the negative effects of cooperation are worth the upside of settlement, it is essential that they and their counsel remain cognizant of these effects when designing internal policies and incentive programs. Failure to do so will invite additional governance and personnel problems.