Duties Regarding Duties

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DUTIES REGARDING DUTIES

RONALD J. COLOMBO*

Corporate directors are subject to the fiduciary duties of care and loyalty in the discharge of their responsibilities. The demands of these duties, from their precise contours to their application under a particular set of circumstances, is oftentimes far from obvious.

In order to properly fulfill their duties of care and loyalty, corporate directors necessarily depend upon corporate counsel: specialized attorneys, whether in-house or external to the corporation, retained to advise and represent the corporation. As attorneys, corporate counsel are themselves subject to a wide array of professional responsibilities, ranging from the exhortations of codes of ethics to duties the breach of which could result in a finding of malpractice. These responsibilities can themselves be ambiguous when brought to bear upon specific situations, and hence the advent of the field of legal ethics, and the phenomenon of experts therein.

This Article explores the potentially perilous confluence of these two sets of obligations in the person of a corporation’s general counsel. For it is, ultimately, the general counsel of a corporation, that specialist of specialists, with whom rests the duty to advise board members of their duties. This Article articulates what this duty entails and, informed by a 2022 survey of general counsel, sets forth suggested best practices to be adopted in order to confidently discharge it.

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I. INTRODUCTION

It would be difficult to overestimate the significance of the business corporation to the modern world. As one scholar accurately observed, “Corporations permeate almost every part of our lives, contributing to so many integral aspects of our existence, including our food, housing, healthcare, security, transportation, amusement, and communication needs.” And at the heart of each corporation, and especially so in the case of publicly traded corporations, is a board of directors. For with the separation of ownership and control that characterizes the business corporation, “the vast majority of corporate decisions are made by the board of directors alone, or by managers acting under delegated authority from the board of directors.”

1. SUSANNA KIM RIPKEN, CORPORATE PERSONHOOD 270 (2019).
3. Id. at 559.
To ensure that boards are properly fulfilling their critical responsibilities, and to safeguard investors and others on whose behalf the corporation operates, corporate law imposes upon directors the fiduciary duties of care and loyalty. Delineation of the precise contours of these duties has confounded courts for over two centuries and has generated a tremendous amount of scholarship.

Naturally, therefore, directors rely on the advice of corporate counsel, typically general counsel, in navigating the shoals of their fiduciary duties. Indeed, it is one of the primary responsibilities of general counsel to render such advice. Consequently, the role of general counsel has aptly been referred to as "pivotal to the affairs of the corporation." He or she is "perhaps the key player" in the complicated legal and business environment in which the modern business corporation operates.

As a licensed attorney, a general counsel is subject to certain professional and ethical duties pursuant to state conduct rules and other applicable sources of law. These duties address, among other things, competence, diligence, and to safeguard investors and others on whose behalf the corporation operates.

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9. See Lovett, supra note 8, at 128.


11. VEASEY & MILLSTEIN, supra note 10, at 3.


13. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 2020).

14. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS’N 2020).
adequacy of client communications,\textsuperscript{15} an understanding of the attorney’s responsibilities within the context of an organizational client,\textsuperscript{16} and advice generally.\textsuperscript{17} As with the fiduciary duties of corporate directors, the exact parameters of a lawyer’s duties are subject to some controversy and debate.\textsuperscript{18}

Thus, corporate counsel’s provision of legal advice to a board of directors is oftentimes fraught with complexity layered upon complexity. This Article examines how such a situation ought to be navigated, along with measures commonly taken to do so.\textsuperscript{19}

This Article will proceed as follows: Part II, immediately below, will briefly summarize the critical fiduciary duties of corporate directors, highlighting the various difficulties in their application. Part III will review the role and obligations of attorneys in general and of general counsel in particular. As will be seen, educating, training, and periodically reminding directors of their duties are critical components in acquitting these obligations.

In conjunction with this Article, general counsel were surveyed as to their practices for educating corporate directors. Part IV will set forth the results of this survey, with an eye toward gleaning industry norms.

Finally, informed by what is currently being done with respect to director training and education (as per Part IV), and in light of what research suggests ought to be done (as per Part III), Part V will proffer a tentative sketch of what best practices in this area might realistically entail. Ideally, this sketch will serve as a springboard for consideration and further discussion, perhaps around which approaches toward director training and education will coalesce. Minimally, in-house counsel who adopt these practices should, hopefully, rest secure in the knowledge that they have served their clients well and safeguarded their professional standing.\textsuperscript{20}

\textsuperscript{15} Model Rules of Pro. Conduct r. 1.4 (Am. Bar Ass’n 2020).
\textsuperscript{16} Model Rules of Pro. Conduct r. 1.13 (Am. Bar Ass’n 2020).
\textsuperscript{17} Model Rules of Pro. Conduct r. 2.1 (Am. Bar Ass’n 2020).
\textsuperscript{19} A related issue, not covered in this Article, is the degree to which general counsel properly educates and advises corporate officers of their fiduciary duties. See generally Lyman P.Q. Johnson & Robert V. Ricca, (Not) Advising Corporate Officers About Fiduciary Duties, 42 Wake Forest L. Rev. 663 (2007).
\textsuperscript{20} Admittedly, malpractice actions against in-house counsel are relatively rare. See, e.g., Larry Smith, In-House Counsel: New Target for Malpractice Actions?, Of Couns., Feb. 1993, at 5. Nevertheless, malpractice precedent in virtually all contexts helps inform the standards of the legal profession generally and, as such, bears upon the best practices of even in-house counsel.
As far back as 2004 it was written that the “call for improved director education is not new.”\textsuperscript{21} This Article does not seek to merely echo that call. Rather, it hopes to contribute to the conversation over director education via a particular focus on the unique role of general counsel in providing (or otherwise ensuring the provision of) that education.

II. FIDUCIARY DUTIES OF CORPORATE DIRECTORS

The board of directors serves a critical, indispensable role in the American business corporation. In this Part, that role, and the duties accompanying it, are briefly summarized. As shall become quickly apparent, no director could be expected to fully appreciate his or her obligations without an education therein, nor satisfactorily discharge them absent competent legal advice.

Because of the predominance of Delaware corporate law, both in terms of the number of business corporations incorporated in Delaware, and in terms of its influence on the law of other states, the following discussion shall focus primarily on the law of Delaware.\textsuperscript{22}

A. Role of the Board of Directors

Per the corporate law of Delaware, as explicitly codified by statute (and as per the corporate law of every other state, in substance if not in exact word), “The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors.”\textsuperscript{23} This establishes, quite clearly, the centrality of the board of directors to the business corporation.


\textsuperscript{22} See Brian R. Cheffins, Delaware and the Transformation of Corporate Governance, 40 DEL. J. CORP. L. 1, 75 (2015).

Indeed, this terse textual summary of the board’s role, as enshrined in the Delaware Code, arguably fails to adequately capture the full extent and depth of the board’s responsibilities. As one scholar has pointed out, corporate boards actually fulfill “multiple roles” within the corporation, including “manager-monitoring, relational, and strategic management.”24 Fulfillment of these roles has required the creation of “specialized board committees,” composed of directors with sufficient expertise, and has led to the proliferation of outside directors, with an eye toward diversification of board composition.25

Additionally, the board undertakes these responsibilities not for its own sake, but essentially, in trust: for the benefit of the corporation and its shareholders.26 For this reason, directors are not held accountable via contract alone, but by the additional imposition of fiduciary duties.27 The importance of these duties prompted one scholar to remark that “[t]he fiduciary duty of directors is perhaps the most powerful and important concept underlying the corporate system.”28

Historically, the fiduciary duties imposed upon corporate directors have consisted of the duty of care and the duty of loyalty.29 Their application over the years, however, has been both complicated and confusing, to the extent that one could reasonably maintain that these duties have multiplied into as many as five.30 Despite how “inherently complex” this situation is, and at the risk of oversimplification, in the pages that follow, I shall set forth these duties in their conventional binary form.31

25. See id.
27. See id.
28. Id.
29. See Velasco, supra note 7, at 1232–33.
30. See id. at 1233.
31. Id. at 1234.
B. Duty of Care

The fiduciary duty of care calls upon directors to “exercise that degree of skill, diligence, and care that a reasonably prudent person would exercise in similar circumstances.” It sets forth the proposition that, as per its name, directors ought to be “careful” in the execution of their responsibilities, in one sense of that word’s meaning (“done with or showing thought and attention”).

However, due to the interposition of the “business judgment rule,” the duty of care’s bark is typically far more threatening than its actual bite. So much so that some scholars have labelled the duty of care as merely “aspirational.” For applying the business judgment rule, courts shall not “weigh . . . directors’ judgments.” Rather, courts will ordinarily restrict their examination of challenged directorial conduct to the directors’ decision-making “process” alone. In other words, a court “will not substitute its own notions of what is or is not sound business judgment for the board’s notions.”

As classically formulated by the Delaware Supreme Court, the business judgment rule sets forth “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in honest belief that the action was taken in the best interests of the company.” The presumption undergirding the business judgment rule may be rebutted by a showing that the directors’ “judgment was arrived at in a negligent manner, or was tainted by fraud, conflict of interest, or illegality.” Thus, as the Delaware Chancery Court explained, the business judgment rule shields directors from liability for alleged breaches of fiduciary duty barring a showing that the directors “(1) had a personal interest in the subject matter of the action, (2) were not fully informed in approving the action, or (3) did not act in good faith in approving the action.”

32. ROBERT CHARLES CLARK, CORPORATE LAW § 3.4, at 123 (1986).
33. Careful, NEW OXFORD AM. DICTIONARY (3d ed. 2010).
34. JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS § 10.01, at 184 (2d ed. 2003).
36. Id. The most notable exception to this reticence being allegations of corporate “waste”: decisions that are substantively irrational. See Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 784 (Del. Ch. 2016), abrogated by Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019); Steiner v. Meyerson, No. 13139, 1995 WL 441999, at *1 (Del. Ch. July 19, 1995) (“Corporate waste occurs when a corporation is caused to effect a transaction on terms that no person of ordinary, sound business judgment could conclude represent a fair exchange.”).
37. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 40 (Del. Ch. 2010) (internal quotations omitted).
39. CLARK, supra note 32, § 3.4, at 124.
40. eBay Domestic Holdings, 16 A.3d at 36 (internal citations omitted).
Consequently, the duty of care and the business judgment rule could be deemed as setting forth a “standard for . . . director conduct” on the one hand, and a “standard of judicial review” on the other (respectively).\(^{41}\) For although directors are exhorted to conduct themselves prudently, diligently, and carefully, judicial evaluation of directorial decision-making will typically be assessed under the lenient, deferential business judgment rule.

Although the business judgment rule gives significant solace to corporate directors,\(^{42}\) directors nevertheless must remain vigilant in the discharge of their duties. First, they must be sure to at least conduct themselves in such a way as to maintain the protections of the business judgment rule. Failure to do so would permit a plaintiff to rebut the rule, thereby potentially exposing the directors to personal liability.\(^{43}\) Second, directorial conduct that pushes the proverbial envelope, testing the protective limits of the business judgment rule, could very well invite expensive, burdensome litigation, which itself exacts a heavy toll upon defendants, regardless of the ultimate outcome.\(^{44}\) “And that is where the General Counsel comes in.”\(^{45}\) For it is only via the competent advice of counsel, as discussed below, that directors can hope to discharge their duty of care most appropriately.\(^{46}\) Such advice would presumably cover, at a minimum, the critical importance of information gathering and analysis prior to any significant board decision, the necessity of undertaking that level of deliberation commensurate with the decision’s weightiness, and the wisdom of consulting with subject matter experts to the extent appropriate.

C. Duty of Loyalty

The duty of loyalty “mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director . . . not shared by the stockholders generally.”\(^{47}\) This duty polices

\(^{41}\) Cox & Hazen, supra note 34, § 10.01, at 184.
\(^{42}\) Clark, supra note 32, § 3.4, at 123.
\(^{44}\) Even if the directors are protected by an exculpatory provision, as permitted under the law of Delaware and other states, see, for example, Del. Code Ann. tit. 8, § 102(b)(7), shielding them from liability on account of the breach of a duty of care, being named a defendant in litigation is rarely a pleasant experience.
\(^{45}\) Veasey & Millstein, supra note 10, at 3.
\(^{46}\) See infra Section V.D.
\(^{47}\) Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993), modified on other grounds, 636 A.2d 956 (Del. 1994).
conflict of interest transactions between a director and the corporation, and, of course, prohibits a director from defrauding the corporation. Because the business judgment rule, discussed above, is predicated upon a presumption of disinterested, good faith decision-making on the part of a director, by its very terms the protections of the business judgment rule are inapplicable to situations in which a duty of loyalty violation is alleged.

Since not every conflict of interest transaction between a director and the corporation is necessarily deleterious to the corporation, modern corporate law permits such transactions under certain circumstances. These circumstances typically involve full disclosure of the director’s interest in the transaction, followed by approval via the vote of disinterested directors or shareholders. Failure to avail one’s self of these prophylactic measures will subject the transaction to scrutiny under the “intrinsic fairness test,” pursuant to which the transaction will be closely examined in order to determine whether it was fair to the corporation.

As with the duty of care, the advice of counsel can be critical in helping a director avoid liability for breaching the duty of loyalty. For what constitutes a “conflict of interest” is not always clear, especially because that concept is pegged to a “materiality” standard. Moreover, the stakes are higher in this context, as exculpatory charter provisions, shielding directors from liability under certain circumstances (as permitted under the corporate law of Delaware and most other states), do not extend their protections to duty of loyalty violations.

On the other hand, although carelessness can be costly, excessive scrupulosity can be as well. The unnecessary resort to the safe harbors of corporate law, via implementation of the curative procedures referenced above, can cause both the director in question and the corporation to incur needless expenses and waste precious time. Counsel’s guidance in such situations can help all parties concerned avoid unnecessary risk on the one hand and excessively cautious measures on the other.

49. See infra Section II.B.
50. See COLOMBO, supra note 5, § 3:5, at 100–01.
51. See id. §§ 3:5–3:7, at 100–04.
52. See id. § 3:23, at 144.
53. See id.
54. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (2020).
55. See supra text accompanying notes 50–51.
D. Caremark Oversight Obligations

An important and not necessarily intuitive manifestation of the duty of loyalty is the directors’ oversight and monitoring obligations, typically referred to as the board’s “Caremark Duties” after the name of the case that propelled such obligations to the forefront of corporate law.

In In re Caremark International Inc. Derivative Litigation, the Delaware Chancery Court opined that the failure to adequately monitor corporate activity can itself constitute a breach of fiduciary duty on the part of the board. In the words of Chancellor Allen:

I am of the view that a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.

Subsequent caselaw (notably Stone v. Ritter), in expanding upon Caremark, has made clear that the oversight duty referred to therein is not an independent duty, but rather falls under the umbrella of the duty of loyalty. The twists and turns of corporate law giving rise to this result are unnecessary for our purposes here. What is critical, however, is recognizing the importance of the Caremark decision and its progeny to corporate directors.

Primarily, Caremark expands a director’s responsibilities beyond that of fulfilling duties in good faith and with sufficient diligence. It expands the director’s responsibilities beyond reacting appropriately to red flags as they appear. For Caremark and its progeny have established an affirmative obligation, on the part of directors, to proactively establish internal corporate information gathering systems and controls and to monitor those systems and controls. In short, Caremark helped launch the modern field of compliance, and rested ultimate responsibility for compliance with corporate directors.

56. COX & HAZEN, supra note 34, at 136–48.
59. Id. at 970.
60. 911 A.2d 362 (Del. 2006).
61. See id. at 369.
62. For an explanation thereof, see Stone, 911 A.2d at 367–70.
Further, as a subset of the duty of loyalty, *Caremark* obligations are not subject to the protections of the business judgment rule.\(^6^5\) Directors accused of violating their obligations under *Caremark* will not, therefore, have recourse to the more lenient, deferential standard of review typical in a duty of care case.\(^6^6\) This heightens the importance, on the part of directors at least, to attend to their oversight obligations with particular care.\(^6^7\) Once again, the need for advice from competent corporate counsel is difficult to overstate.

**E. Duties Under Particular Circumstances**

The duties of a director, as set forth above,\(^6^8\) constitute general, pervasive obligations touching upon pretty much everything a director does or decides. They apply in practically all circumstances and should be fully internalized, becoming a natural part of the director’s thinking and reasoning.

Other duties can arise, however, upon the emergence of particular situations or within specific contexts. Similarly, application of the duties discussed above can become subject to certain enhancements or restrictions under special circumstances. For example, directors of investment companies have distinct obligations not necessarily shared with those of other corporations,\(^6^9\) and directors of nonprofit companies are oftentimes subjected to standards of conduct that vary from that applicable to those of for-profit enterprises.\(^7^0\)

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\(^6^5\). They are also not subject to the potential protections of exculpatory charter provisions since *Caremark* violations are duty of loyalty violations. See *supra* text accompanying note 54.

\(^6^6\). See *supra* Section II.B.

\(^6^7\). That said, it should be noted that liability under *Caremark* is itself difficult to impose. Per the Delaware Supreme Court in *Stone:*

> We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations.

*Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006). On the other hand, the stakes in a *Caremark* litigation, as in all duty of loyalty cases, are typically heightened for directors because corporate exculpatory provisions are inapplicable. See Martin Petrin, *Assessing Delaware’s Oversight Jurisprudence: A Policy and Theory Perspective*, 5 VA. L. & BUS. REV. 433, 449 (2011).

\(^6^8\). See *supra* Sections II.A–D.

\(^6^9\). See, e.g., 1 WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 13.06 (8th ed. 2022).

\(^7^0\). See, e.g., COLOMBO, *supra* note 5, §§ 23:3–7, at 1588–97.
ERISA, RICO, some environmental statutes, and other laws can impose personal liability upon directors under certain conditions.

With regard to public companies, the full weight of the federal securities laws falls upon the corporation, requiring particular vigilance on the part of directors with regard to this complicated and frequently changing body of regulation. Further, federal legislation has increasingly encroached upon the state’s role in defining the duties of corporate boards, imposing upon directors additional oversight duties and certification responsibilities. Still more responsibilities are imposed upon such companies by self-regulatory organizations, such as the New York Stock Exchange and the Financial Industry Regulatory Authority.

Even with respect to the traditional state-based common law duties of care and loyalty, courts have fine-tuned their application within certain contexts (such as, for example, that of a threatened or inevitable takeover), setting forth further adjustments to a director’s responsibilities.

In short, the director of a modern corporation, and especially of a public business corporation, must be sure to abide by a number of serious, complicated, and not necessarily obvious legal obligations. The ongoing assistance of competent legal counsel is critical to the director’s success.

71. See e.g., JAMES A. FANTO, DIRECTORS’ AND OFFICERS’ LIABILITY § 6.6 (2d ed. 2015).
72. See e.g., KNEPPER & BAILEY, supra note 69, § 6.10.
73. See id. §§ 10.01–10.
74. See e.g., FANTO, supra note 71, §§ 6.1–5 (addressing duties imposed by securities laws upon officers and directors); KNEPPER & BAILEY, supra note 69, § 6.09 (addressing potential director liability under antitrust law).
77. See BASRI, supra note 76, § 16.06.
III. ROLE AND DUTIES OF GENERAL COUNSEL

A corporation’s general counsel constitutes its chief legal officer.\(^8\) Although sometimes referred to interchangeably as “corporate counsel,” the better practice is to recognize a difference between the two, with “corporate counsel” referring to all attorneys who undertake the representation of an organizational (corporate) client, and “general counsel” reserved for those attorneys who are indeed the corporation’s chief legal officer.\(^2\)

Not surprisingly, unique and important responsibilities fall upon the shoulders of a corporation’s general counsel, as will be discussed below.\(^3\) But as a member of the bar, rules of conduct and standards of care common to all attorneys also serve to inform this individual’s discharge of various obligations. These too must be examined, as their application within the corporate context is germane to our inquiry.

In this Part, we shall first focus on the professional responsibilities of attorneys in general, thereafter on those of corporate counsel, and ultimately on those of general counsel.

A. Professional Responsibilities Common to All Attorneys

Attorneys in the United States practice law subject to multiple conventions of conduct. At the forefront of these are codes of professional conduct applicable in the states in which attorneys are admitted to practice.\(^4\) These codes, collectively, have a distinguished pedigree and reflect centuries of experience regarding the regulation of the legal profession.\(^5\) Currently, in the United States, all jurisdictions have adopted codes of professional conduct based upon or similar to the American Bar Association’s Model Code of Professional Responsibility and its Model Rules of Professional Conduct.\(^6\) These codes of conduct set forth guidelines for attorney behavior, often

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11. See infra Sections III.D–E.
articulated in terms that vacillate between aspirational versus mandatory, and which (with regard to those items that are mandatory) receive enforcement typically at the hands of state bar disciplinary committees. They touch upon and address nearly all aspects of the attorney-client relationship, from scope of representation to conflict of interest and the safekeeping of client property. These rules also address an attorney’s duties to opposing counsel, third parties, and to the system of justice generally. Finally, the rules include provisions for safeguarding the integrity of the legal profession generally, including responsibilities specific to the practice of law within a firm and the parameters of proper attorney advertising and solicitation. Separately, and overlapping in terms of their historical development, are standards of care established via judgments in malpractice actions, whether predicated upon breach of fiduciary duty, breach of contract, or tort (negligence). Each successive judgment in such actions informs the bar as to the minimally acceptable standards of care necessary in order to avoid liability at the hands of an aggrieved client (or, at times, a third party). A frequently cited case summarizing an attorney’s duties of competence toward his or her client in this regard is Lamb v. Barbou. The court noted: “[A]n attorney is required to exercise on his client’s behalf the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated and to employ reasonable care and prudence in connection therewith.” If an attorney breaches these duties, he is “answerable in damages” for losses which “are proximately caused by his negligence.”

87. See MALLEN, supra note 86, § 1:20, at 48–49.
89. See MODEL RULES OF PROF. CONDUCT r. 1.2 (AM. BAR ASS’N 2020).
90. See MODEL RULES OF PROF. CONDUCT r. 1.5 (AM. BAR ASS’N 2020).
91. See MODEL RULES OF PROF. CONDUCT r. 1.7–1.8 (AM. BAR ASS’N 2020).
92. See MODEL RULES OF PROF. CONDUCT r. 1.15 (AM. BAR ASS’N 2020).
93. See MODEL RULES OF PROF. CONDUCT r. 3.4 (AM. BAR ASS’N 2020).
94. See MODEL RULES OF PROF. CONDUCT r. 4.1–4.4 (AM. BAR ASS’N 2020).
95. See MODEL RULES OF PROF. CONDUCT r. 3.3, 6.1–6.5 (AM. BAR ASS’N 2020).
96. See MODEL RULES OF PROF. CONDUCT r. 8.1–8.5 (AM. BAR ASS’N 2020).
97. See MODEL RULES OF PROF. CONDUCT r. 5.1–5.7 (AM. BAR ASS’N 2020).
98. See MODEL RULES OF PROF. CONDUCT r. 7.1–7.3 (AM. BAR ASS’N 2020).
100. See Anderson & Steele, supra note 99, at 248.
102. Id. at 1125.
103. Id.
Lamb is not an outlier among the states, but rather sits comfortably within the traditional understanding of a lawyer’s duties throughout most jurisdictions.\textsuperscript{104} To the extent that an attorney “specializes within the profession,” the attorney “must meet the standards of knowledge and skill of such specialists.”\textsuperscript{105}

The interplay between rules of professional conduct and those duties necessary to be observed in order to avoid liability for malpractice varies from jurisdiction to jurisdiction. In most jurisdictions, a violation of an ethical rule (such as those contained in a jurisdiction’s code of professional responsibility), does not, per se, concomitantly constitute a breach of duty sufficient for the imposition of liability for attorney malpractice.\textsuperscript{106} And for good reason, as “[t]here are several significant differences between a civil malpractice action and a disciplinary proceeding.”\textsuperscript{107} Rather, the general rule is that the ethical rules can serve as factors in delineating the standard of negligence in an attorney malpractice action, and as such, the violation of ethical rules has evidentiary, albeit inconclusive, value.\textsuperscript{108}

Taken together, a jurisdiction’s code of professional responsibility and its law of attorney malpractice establish a baseline set of rules that each attorney is bound to observe at the peril of ethical sanction or monetary liability (or both). For our purposes, the precise delineation of which of these two potential consequences applies to a given situation is not of primary importance. Rather, critical to our inquiry is recognition of all those rules and guides of conduct, regardless of source or consequence if breached, that bear upon an attorney’s obligations to his or her corporate clients.

\textbf{B. Professional Responsibilities Particularly Relevant to Corporate Counsel}

Five provisions of the \textit{Model Rules of Professional Conduct} are particularly relevant, or subject to particularized application, with respect to corporate counsel. These are Model Rules 1.1, 1.3, 1.4, 1.13, and 2.1, and require close inspection.
i. Organization as a Client (Rule 1.13)

A critically important, threshold task incumbent upon all corporate counsel is “defining the client to whom counsel owes a duty.” For unlike a flesh-and-blood client, the organizational client consists of various stakeholders, and “counsel must distinguish between the interests of the management and the interests of the corporate client.”

Model Rule of Professional Conduct 1.13 addresses this, in full, as follows:

1.13 Organization as the Client
(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
(c) Except as provided in paragraph (d), if
(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to
investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(c) A lawyer who reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

(f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.\(^\text{111}\)

The *Restatement (Third) of the Law Governing Lawyers* contains a provision analogous to Rule 1.13,\(^\text{112}\) underscoring to whom an attorney owes duties:

- “A lawyer who has been employed or retained to represent an organization as a client owes professional duties of loyalty and competence to the organization.”\(^\text{113}\)
- “[P]ersonal dealings with [officers, directors, and employees] do not lessen the lawyer’s responsibility to the organization as client, and the lawyer may not let such dealings hinder the lawyer in the performance of those responsibilities.”\(^\text{114}\)

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113. *Id.*
114. *Id.* The official comments then proceed to explain the implications of these duties, by stating, among other things, that:
Typically, a lawyer’s interactions are with clients directly. Those with whom the lawyer communicates and takes direction from are also those to whom the lawyer owes professional allegiance. As Rule 1.13 recognizes, with the organizational client things are jarringly different. The corporate client famously has “no soul to damn, no body to kick.” The corporate client cannot be interacted with directly, but only via its agents as intermediaries. Unlike the corporation, however, these agents, typically the corporation’s officers and directors, are genuine flesh-and-blood persons. Given human nature, there is a natural tendency to develop an affinity to these individuals, and to view them as the client—the former being a potentially dangerous development and the latter being an understandable but critical error. Rule 1.13 serves as an important reminder of perils.

Perhaps the most challenging aspect of Rule 1.13 is the requirement that corporate counsel “proceed as is reasonably necessary in the best interest of the organization” when confronted with a situation in which:

> An officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.

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A lawyer representing an organization is required to act with reasonable competence and diligence in the representation . . . and to use care in representing the organizational client . . . . The lawyer thus must not knowingly or negligently assist any constituent to breach a legal duty to the organization.

RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 96 cmt. e (AM. INST. 2000).


116. See MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS’N 2020).

117. Mutual human affinity is, of course, ordinarily a laudable thing. Problematic, however, is that level of familiarity and affinity that might undermine a professional’s ability to see clearly, reason objectively, and render advice dispassionately. Cf. Matthew J. Barrett, Enron and Andersen—What Went Wrong and Why Similar Audit Failures Could Happen Again, in NANCY N. RAPAPORT & BALA G. DHIKAN, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 155, 158–62 (Foundation Press 2004).

118. William H. Simon, Introduction: The Post-Enron Identity Crisis of the Business Lawyer, 74 FORDHAM L. REV. 947, 947 (2005) (“A powerful tendency . . . prompt[s] [corporate counsel] to conflate the client with the managers who retain and instruct the lawyer. The lawyer has obvious material incentives to adopt this course, and powerful psychological forces promote it. Personal solidarity with the people you collaborate with is one of the most satisfying rewards of high-status work.”).

119. See MODEL RULES OF PRO. CONDUCT r. 1.13(b) (AM. BAR ASS’N 2020).
What is “reasonably necessary” can, as Rule 1.13 makes explicitly clear, involve “refer[ring] the matter to higher authority in the organization.”\textsuperscript{120} This can very well mean blowing the whistle on an individual with whom the attorney has a longstanding relationship to someone with whom the attorney does not. Under such circumstances, the temptation to minimize or rationalize the wrongdoing in question must be powerful, especially in light of the tremendous opportunity to do so. For as the comments to Rule 1.13 note, “When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province.”\textsuperscript{121}

Other comments to Rule 1.13 provide still more avenues of escape for an attorney wishing to avoid the prospect of reporting upon potential misconduct:

In determining how to proceed under [Rule 1.13(b)], the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of the law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority.\textsuperscript{122}

The language suggesting that “[o]rdinarily, referral to a higher authority would be necessary” notwithstanding the corners within which a lawyer may hide to avoid such referrals are plentiful and dark indeed.\textsuperscript{123} The lawyer may take into consideration the agent’s “apparent motivation”; he may deem the wrongdoing one of “innocent misunderstanding”; he must accept decisions of “doubtful” “utility or prudence”; and determinations categorized as ones of “policy and operations, including ones entailing serious risk,” are beyond the attorney’s responsibilities to report upon.\textsuperscript{124} The suggestion here is not that the Model Rules’ commentary is inconsistent with the text of the rule, or that it

\begin{itemize}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{MODEL RULES OF PRO. CONDUCT} r. 1.13 cmt. 3 (AM. BAR ASS’N 2020).
\item \textsuperscript{122} \textit{MODEL RULES OF PRO. CONDUCT} r. 1.13 cmt. 4 (AM. BAR ASS’N 2020).
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{MODEL RULES OF PRO. CONDUCT} r. 1.13 cmts. 3–4 (AM. BAR ASS’N 2020).
\end{itemize}
suggests an approach that is of two minds. Rather, the point is the more modest proposition that the nuances and delicateness of such situations, as laudably recognized by the Model Rules, will permit many attorneys to see what they want to see and not what they ought to see. These difficulties may be compounded when the corporate counsel in question works in-house, for in such cases there is even less distance between the attorney and his or her client’s agents.\textsuperscript{125} In any event, the bottom line remains the same: “lawyers [are] reluctant to antagonize corporate officers because their jobs, assignments, or retentions depend on their good will.”\textsuperscript{126}

ii. General Rules of Competence (Rules 1.1, 1.3, 1.4, and 2.1)

Each of Rules 1.1, 1.3, 1.4, and 2.1 focus upon a different facet of an attorney’s obligations to his or her clients. These rules overlap to a degree, making delineation of one from another difficult at times, especially in their application. Thus, an attorney who fails to “promptly comply with reasonable requests for information” from his or her client in violation of Rule 1.4, may very well be failing to “act with diligence and promptness” in violation of Rule 1.3.\textsuperscript{127} What emerges from these rules, in sum, is the attorney’s obligation to represent clients responsibly: with competence, diligence, candor, and judgment. As summarized in the preamble to the Model Rules: “In all professional functions a lawyer should be competent, prompt and diligent.”\textsuperscript{128}

The text of these rules, in full, is as follows:

Rule 1.1: Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.\textsuperscript{129}

Rule 1.3: Diligence
A lawyer shall act with reasonable diligence and promptness in representing a client.\textsuperscript{130}

\textsuperscript{125} See Thomas B. Metzloff, Ethical Considerations for the Corporate Legal Counsel, C566 ALI-ABA 109, 114 (1990).

\textsuperscript{126} Stephen Gillers, \textit{How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession}, 40 PEPP. L. REV. 365, 384–87 (2013). Congress famously attempted to address this problem in the Sarbanes-Oxley Act, but ultimately prescinded from taking the more forceful step of mandatory reporting that was originally contemplated. \textit{See id. at} 386.

\textsuperscript{127} See HENRY C. WALENTOWICZ & MATTHEW S. SLOWINSKI, REAL ESTATE LAW AND PRACTICE: NEW JERSEY PRACTICE SERIES § 26:12 (3d ed. 2018) (“The failure to communicate with clients reflects adversely on the fitness to practice and is an item constituting gross negligence.”).

\textsuperscript{128} MODEL RULES OF PRO. CONDUCT pmbl. 4 (AM. BAR ASS’N 2020).

\textsuperscript{129} MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 2020).

\textsuperscript{130} MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS’N 2020).
DUTIES REGARDING DUTIES

Rule 1.4: Communication
(a) A lawyer shall:
   (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
   (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
   (3) keep the client reasonably informed about the status of the matter;
   (4) promptly comply with reasonable requests for information; and
   (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.  

Rule 2.1: Advisor
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

Although the rules set forth above are fairly self-explanatory, a few items bear emphasis and deeper consideration. With regard to Rule 1.1, addressing the question of basic competence, the official commentary states that “[i]n many instances, the required proficiency is that of a general practitioner,” but hastens to add that “[e]xpertise in a particular field of law may be required in some circumstances.” Given the complexity of corporate law, as discussed previously, the role of corporate counsel is undoubtedly one in which expertise is called for.

The Restatement (Third) of the Law Governing Lawyers similarly expresses an obligation on the part of attorneys to act “with reasonable competence and

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134. See generally Barbara Graves-Poller, Is Pro Bono Practice in Legal “Backwaters” Beyond the Scope of the Model Rules?, 13 U.N.H. L. Rev. 1, 62 (2015); Metzloff, supra note 125; Peregrine & DUCKETT, supra note 81. It should be noted that this requirement does not necessarily foreclose corporate counsel opportunities to newer attorneys; expertise may be obtained via adequate preparation. Model Rules of Pro. Conduct r. 1.1 cmt. 2 (Am. Bar Ass’n 2017).
diligence.” In fleshing out the standard of care commensurate with this obligation, the Restatement explains that a lawyer “must exercise the competence and diligence exercised by lawyers in similar circumstances.” These standards mirror those imposed in most jurisdictions in an action for attorney malpractice, specifically that “[i]liability attaches to the attorney upon failure to exercise a reasonable degree of care and skill . . . . The standard against which an attorney’s conduct is measured is the degree of care that is usual and customary practice for lawyers under similar circumstances.”

The comments to Rule 1.4 (Communication) underscore the attorney’s responsibility to ensure that the client has “sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.” Combined with the text of the rule itself, it is clear that corporate counsel have an obligation to ensure that the officers and directors he or she is advising adequately grasp their duties as such. This obligation implicates the educative function of lawyers—especially in-house and other corporate counsel, discussed later in this Article.

Rule 2.1 (Advisor) is couched in terms that are, in part, optional (“a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation”). The comments to the rule add that “[i]n general, a lawyer is not expected to give advice until asked by the client.” However, in light of the significance of corporate social responsibility to twenty-first century businesses, one could reasonably argue that a discussion of “moral, economic, social and political factors” relevant to a client’s situation is quasi-imperative. For such a discussion is no longer simply an exercise in an attorney’s self-affirmation—an effort on the attorney’s part to promote personal values to a captive audience. Rather, in today’s business environment, sensitivity to such concerns is an indispensable asset.

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136. Id. § 52.
138. Model Rules of Professional Conduct r.1.4 cmt. 5 (A.M. Bar Ass’n 2020).
139. See infra Section V.D.
140. Model Rules of Professional Conduct r. 2.1 (A.M. Bar Ass’n 2020) (emphasis added).
141. Model Rules of Professional Conduct r. 2.1 cmt. 5 (A.M. Bar Ass’n 2020).
Moreover, Rule 2.1 requires that attorneys ("a lawyer shall") render "candid advice."\textsuperscript{143} Although the comments point out that "[i]n general, a lawyer is not expected to give advice until asked by the client,"\textsuperscript{144} this gloss would appear to be inapposite when the attorney is general counsel to a corporate client. For the very role of general counsel requires him or her to anticipate and advise upon, as best possible, all foreseeable legal threats to his or her corporate client. More appropriate, therefore, would be the admonition contained later in the same comment to Rule 2.1:

[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation.\textsuperscript{145}

For in-house general counsel, arguably everything the corporation does is "related to the representation," and as such this duty to render advice proactively would seem to perdure throughout counsel’s tenure. For outside counsel serving as general counsel, the situation can become a bit murky, especially if the governing engagement letter lacks clarity. Nevertheless, this duty would apparently impose, at a minimum, a considerable burden on such an individual to remain particularly engaged in his or her client’s decisions and undertakings.

Finally, in-house counsel in particular must resist the temptation to "drink the Kool-Aid" being served by the corporate client.\textsuperscript{146} The confluence of interests in the in-house context between attorney and client can be so strong as to obscure the vital separation that must be maintained between the two in order to preserve attorney independence.\textsuperscript{147}

Thus, as explained at the outset of this Section, the above-referenced rules can fairly be characterized as various articulations of the corporate lawyer’s duty to serve his or her client competently. Rule 1.1 sets forth a general standard of competence, and the other rules essentially apply this to the lawyer’s communications and advice to the client.

\textsuperscript{143} Model Rules of Prof. Conduct r. 2.1 (Am. Bar Ass’n 2020) (emphasis added).
\textsuperscript{144} Model Rules of Prof. Conduct r. 2.1 cmt. 5 (Am. Bar Ass’n 2020).
\textsuperscript{145} Id.
\textsuperscript{146} Cf. Kay L. Levine & Ronald F. Wright, Images and Allusions in Prosecutors' Morality Tales, 5 Va. J. Crim. L. 38, 56–57 (2017) ("The term ‘Kool-Aid drinker’ is a reference to the 1978 cult mass suicide in Jonestown, Guyana. Jim Jones, the cult leader, convinced his followers to commit suicide by drinking grape Kool-Aid that (unbeknownst to some of them) was laced with potassium cyanide.").
C. The Role of Corporate Counsel

The preceding Section largely focused on “how” an attorney is to conduct himself or herself when representing a corporate client. In this Section, we shall focus more intentionally on “what” an attorney is expected to accomplish for such a client. In other words, the role of corporate counsel.

At its most basic level, corporate counsel, like most other attorneys, is a problem solver. He or she assists a client in overcoming a particular challenge (or ongoing series of challenges). These challenges are typically of a legal nature, and hence call upon the attorney’s legal expertise, but commonly encompass matters of a non-legal nature as well (such as predicaments that are primarily personal or business in nature). The attorney’s assistance, and oftentimes judgment, is called upon in identifying and executing a lawfully sound strategy to help with resolving the problem in question.

Closely related to this function is that of a problem avoider. An attorney, and especially corporate counsel, typically works proactively to help her client identify and evade or otherwise minimize risk (typically legal risk) implicated by the client’s various undertakings (or potential inaction). This is typically (and accurately) characterized as risk management. The attorney assists her clients in conducting their affairs in such a way as to reduce to an acceptable minimum the risks attendant to the client’s choices and courses of action. This includes help with navigating legal and regulatory thickets that may be uncertain in application for a number of reasons.

Superior attorneys identify challenges posed by the law and opportunities presented by changes in laws and regulations. The dynamic nature of the law is such that doors foreclosed one year may be opened the next, and it is largely the responsibility of corporate counsel to recognize such developments for what they are.149

D. General Counsel

Building upon and subsuming all previous ethical and legal obligations discussed are those of a corporation’s general counsel. As chief legal officer of the company, a corporation’s general counsel is ultimately responsible for providing quality legal services to the corporation. Indeed, it is difficult to exaggerate the unique importance of the general counsel’s role.150 This role has been described in various emphatic terms as follows:

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148. See, e.g., id. at 15–17, 96–101, 105, 118–120.
149. See id. at 157.
150. See, e.g., Heineman Jr., supra note 10, at 150.
• “The role of the General Counsel of a public company is central to an effective system of corporate governance.”

• As the chief legal counsel of a company, “a general counsel bears the true onus of insuring a company is receiving appropriate and quality legal counseling on all necessary issues at all times.”

• “The General Counsel has a special, critical role . . . . This involves such actions as clear articulation of policy; robust education and training . . . .”

• “At a minimum, the attorney’s role as a governance counselor to public companies should include regularly working with directors and officers on the following issues and activities . . . . Identification and compliance with fiduciary duties.”

William Horton and Michael Peregrine summarized the situation well when they wrote:

The growing consensus of commentators on the corporate responsibility environment is that the general counsel must play a crucial role in corporate affairs generally, and in the governance process in particular. The general counsel is—or at least should be—both a primary advisor to executive leadership and an important resource to the governing board in the exercise of the board’s oversight function. In these roles, the general counsel assists its clients—the corporation—to recognize, understand and comply with relevant laws, as well as to identify and analyze business risks related to legal issues.

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152. Lovett, supra note 8, at 121. Although the focus of this Article has been on the business corporation, nonprofits too need quality advice and guidance from general counsel: “it is becoming increasingly important for such directors and trustees to have the benefit of corporate counsel’s advice on the exercise of fiduciary and other related duties.” MICHAEL W. PEREGRINE, HOSPITALS AND HEALTH SYSTEMS LAW INSTITUTE, Westlaw AHLA-Papers P02109910 (1999); see also Joel Mayer, Nonprofit Doesn’t Equal Noncompliance, N.J. LAW. MAG., Apr. 2010, at 24-25 (addressing the importance of nonprofits to implement federal corporate governance reforms required of public, for-profit corporations); KNEPPER & BAILEY, supra note 69, § 1.02.


154. GUTTERMAN, supra note 76, § 221:255(2).

By extrapolation, the duties of a corporation’s general counsel would extend to his office, to the extent that the general counsel has an independent staff. Similarly, if a law firm (rather than an individual lawyer) serves as general counsel to the corporation, the duties discussed above would fall upon the firm as a whole (with the important caveat that an engagement letter could serve to limit or otherwise circumscribe the scope of these duties).

E. Case Law Regarding the Duties of General Counsel

At the core of the general counsel’s responsibilities is that of being, simply put, competent. Indeed, many of the principles discussed above could, arguably, be deemed manifestations of competence: competence in communications, competence in the provision of legal advice, and competence in the avoidance and navigation of conflicts.

One test of a lawyer’s competence could, arguably, be the degree to which that lawyer has contributed to the corporation’s success. This could be measured in part by the extent that the attorney has played a role in the corporation’s growth and prosperity, the identification and prudent minimization of risk, or via the discovery of valuable opportunities and ways to seize them. In other words, to the extent that an attorney has served the corporate client well, he or she could be deemed quite competent.

Conversely, to the extent that the attorney has impeded his client’s success, causing the corporation to repeatedly run ashore the various shoals of corporate liability, the attorney can be deemed incompetent.

To help flesh out the contours of a lawyer’s duties, therefore, we can turn to precedent in which the attorney’s actions, or failure to act, resulted in client harm. Given the importance of comprehending who the lawyer’s client really is, as elaborated upon above, it would be particularly helpful to examine


157. See supra Section III.B.i.
those instances in which an attorney has failed to properly understand to whom his duty lies, and, consequently, neglected to act appropriately in the face of wrongdoing.

Unfortunately, “[f]ew reported decisions have addressed directly the organizational lawyer’s duties to disclose constituent wrongdoing or her exposure to liability for failing to prevent harm to the organization through such disclosure.”\textsuperscript{158} Typically, “such claims have resulted in substantial settlements with insured law firms prior to any final adjudication.”\textsuperscript{159} Two noteworthy cases that do shed some light on these issues are \textit{FDIC v. Clark}\textsuperscript{160} and \textit{Pereira v. Cogan}.

In \textit{FDIC v. Clark}, the Tenth Circuit was presented with an action brought by the Federal Deposit Insurance Corporation (FDIC) against two corporate lawyers and their law firm.\textsuperscript{162} The case stemmed from the insolvency of Aurora Bank, precipitated by a fraudulent conspiracy within the bank spearheaded by its chief executive officer and other individuals.\textsuperscript{163}

Via wrongful use of a bank checking account, the conspirators, over a course of seven months, “attempted to drain $2 million from the Aurora Bank.”\textsuperscript{164} Throughout this time the bank’s “directors had no information about the scheme.”\textsuperscript{165}

The first individual at the bank to learn of the conspiracy (aside from the co-conspirators) was its attorney, defendant Clark.\textsuperscript{166} In his capacity as registered agent for the bank, he received a civil summons and complaint brought by two bank customers (the “Rizzo case”) alleging fraudulent wrongdoing on the part of the bank’s president and chief executive officer, Nowfel.\textsuperscript{167} “After defendant Clark was served with the complaint, he called Nowfel about it and Nowfel told Clark that it was simply a misunderstanding between borrowers and would be resolved.”\textsuperscript{168} Notably, “Clark did not inquire further, and neither Clark nor Swanson [another co-defendant attorney who represented Aurora Bank at the time] asked Nowfel any other questions about

\begin{itemize}
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} 978 F.2d 1541 (10th Cir. 1992).
  \item \textsuperscript{161} 294 B.R. 449 (S.D.N.Y. 2003), vacated and remanded sub nom. Pereira v. Farace, 413 F.3d 330 (2d Cir. 2005).
  \item \textsuperscript{162} See 978 F.2d at 1543.
  \item \textsuperscript{163} See id. at 1543, 1546.
  \item \textsuperscript{164} Id. at 1546.
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} See id. at 1546.
  \item \textsuperscript{167} See id. at 1546–47.
  \item \textsuperscript{168} Id. at 1547.
\end{itemize}
In their description of the Rizzo case to Aurora’s board, defendants largely parroted the facts as told to them by Nowfel.\footnote{169}{Id.}\footnote{170}{See id.}\footnote{171}{Id. at 1546.}\footnote{172}{Id.}\footnote{173}{Id. at 1543.}\footnote{174}{Id.}\footnote{175}{Id. at 1550; accord Lamb v. Barbour, 455 A.2d 1122, 1125 (N.J. Super. Ct. App. Div. 1982) (“[A]n attorney is required to exercise on his client’s behalf the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated and to employ reasonable care and prudence in connection therewith.”).}\footnote{176}{Clark, 978 F.2d at 1550.}\footnote{177}{Id.}\footnote{178}{Id. at 1543.}\footnote{179}{See id. at 1554.}\footnote{180}{294 B.R. 449 (S.D.N.Y. 2003), vacated and remanded sub nom. Pereira v. Farace, 413 F.3d 330 (2d Cir. 2005).}\footnote{181}{See id. at 463.} The facts revealed that “defendant attorneys represented the Aurora Bank in a number of matters from the time of its opening until the time it was closed by state regulators.”\footnote{171}{Id.} As in the instant matter, defendants were employed by the law firm that was designated “the Bank’s legal counsel.”\footnote{172}{Id.} The defendants in Clark (Clark, Swanson, and their law firm) “were not personally involved in the fraud.”\footnote{173}{Id.} Rather, the FDIC alleged that the defendants’ “professional negligence” and their “breach of an implied warranty of professional capacity and ability” contributed to the insolvency of Aurora Bank.\footnote{174}{Id.}

The standard of conduct applied to the attorneys in Clark (Colorado’s) was typical, and formulated as follows: “[A]n attorney owes his client a duty to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession.”\footnote{175}{Id.}

Defendants argued “that they were in fact the victims of Nowfel’s fraud, that they were in no way responsible for the fraudulent scheme, and that they had no duty to ferret out and discover its nature.”\footnote{176}{Clark, 978 F.2d at 1550.}\footnote{177}{Id.}\footnote{178}{Id. at 1543.}\footnote{179}{See id. at 1554.} The court disagreed, declaring that defendants “misconstrue[d] the nature of their professional duty.”\footnote{177}{Id.} After a jury trial, defendants were found “liable for negligence in their capacity as attorneys for the bank,”\footnote{178}{Id. at 1543.}\footnote{179}{See id. at 1554.} and the Tenth Circuit affirmed.\footnote{179}{See id. at 1554.}

The second case of note is Pereira v. Cogan,\footnote{180}{294 B.R. 449 (S.D.N.Y. 2003), vacated and remanded sub nom. Pereira v. Farace, 413 F.3d 330 (2d Cir. 2005).} from the Southern District of New York. As with Clark, Pereira involved a company (Trace, a private corporation) that was ultimately forced into bankruptcy by the wrongdoing of its chief executive officer (Cogan).\footnote{181}{See id. at 463.} The claims in Pereira were brought by the bankruptcy trustee against, among others, the general counsel to the
corporation (Smith). Smith was accused of failing to meet his obligations, as general counsel, to Trace corporation.

The court in *Pereira* expounded upon the duties of general counsel in some detail. Aided by the submission of an expert report that set forth the duties of directors and corporate counsel, the court credited the expert’s assertion that “the role of General Counsel is to advise the board as to its statutory obligations and provide guidance and recommend measures necessary to meet those obligations.” Since the board’s “central function is to direct the management of the company,” the obligations upon which general counsel should have advised the board were, among others, as follows:

- “[The establishment of] practices and procedures that will enable it [the board] to discharge its responsibilities effectively and set the proper ethical tone. Such practices and procedures should include, *inter alia*, reporting and monitoring systems, codes of conduct and compliance policies.”
- “[The establishment of] practices or procedures for reviewing the propriety of granting loans or other personal expenditures.”
- “[The existence of] compliance policies or a compliance officer.”
- “[The establishment of] effective Audit and Compensation Committees, or itself [the board] exercise those functions if it chooses not to have such committees. . . . The audit function includes accounting matters in addition to serving as a ‘watchdog’ to protect the corporation and its constituents from improper internal acts. These functions cannot be performed properly by remaining passive. . . . [A] compensation committee is charged with protecting the corporation’s resources and evaluating the performance of management. A compensation committee should conduct a review of management at least annually, and it should seek objective advice, such as by retaining outside compensation experts.”

The expert report summarized these duties as follows:

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182. See id. at 465–69. Smith was also an officer of Trace. *Id.* at 468.
183. See id. at 522–24.
184. *Id.* at 499.
185. *Id.* at 498.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 499.
The Board members were not instructed in their statutory duties and responsibilities. They were not informed or reminded of their oversight obligations in managing the corporation, or in fulfilling their particular duties in the corporate governance process. To the extent Trace’s General Counsel, Philip Smith, should have assisted the Board in performing their requisite functions, he offered no such guidance, advice, information, or direction. Indeed, he admitted as much, and believed it wasn’t his responsibility – or the Board’s. In my opinion, he was clearly wrong. His duty, as General Counsel, was to educate and counsel the Board on its leading role, recommend necessary and appropriate measures to fulfill its fiduciary obligations, and implement the decisions it should have made (but did not) to set the tone for the company.\footnote{190}

The court concluded that defendant Smith “failed to meet” his obligations, “as he never discussed with the Board the need to establish compliance and monitoring programs or an audit committee and the obligation to supervise and evaluate Cogan as CEO.”\footnote{191}

In his defense, Smith argued, among other things, that he “did not believe that the directors had the legal duty” to fulfill all of the obligations which they were ultimately found responsible for fulfilling.\footnote{192} This was to no avail, for “as General Counsel, it was his responsibility to take steps to so inform himself.”\footnote{193}

Clark and Pereira stand for the proposition that to whom much responsibility is given, much responsibility is expected. Attorneys who accept the role of general counsel, whether serving as in-house attorneys or not, cannot fulfill their duties passively. General counsel may not merely provide advice when sought but, as mentioned previously, must actively and persistently seek to protect their clients in all their various undertakings (to the extent reasonably


\footnote{191. \textit{Pereira}, 294 B.R. at 523. With regard to some of the wrongdoing that occurred at Trace, Smith was not ultimately held liable for his breach of duty, as the court concluded that “there is no evidence that any advice would have resulted in the Board’s taking proper action.” \textit{Id.} But for other aspects of the wrongdoing, for which Smith’s advice would have been followed, the court concluded that Smith could be held liable. \textit{See id.} at 524.}

\footnote{192. \textit{Id.} at 524.}

\footnote{193. \textit{Id.}; \textit{see also} F.D.I.C. v. O’Melveny & Myers, 969 F.2d 744, 748 (9th Cir. 1992) (quoting Smith v. Lewis, 530 P.2d 589, 596 (Cal. 1975) (“An attorney’s failure to perform in accordance with his duty is negligence, because ‘[e]ven as to doubtful matters, an attorney is expected to perform sufficient research.’”), overruled on other grounds by \textit{In re} Marriage of Brown, 544 P.2d 561 (Cal. 1976)), rev’d sub nom. O’Melveny & Myers v. F.D.I.C., 512 U.S. 79 (1994).}
possible). The nature of this duty is such that when receiving a client’s answers to their questions, general counsel may not accept at face value those statements and communications that a reasonable person, in the same situation, would find problematic. Among other things, this can be derived from the fact that the individuals with whom corporate counsel interact are not their true clients, but merely representatives of their true client—the corporation. Such representatives are certainly fallible and may intentionally or unintentionally take action that conflicts with the corporation’s best interests. General counsel must remain vigilant to such possibilities and critically review anything encountered that bears suspicion.

In sum, Clark and Pereira embrace a robust view of general counsel’s responsibilities, along with a strict standard against which general counsel’s conduct will be measured.

IV. SURVEY

In conjunction with this Article, a survey of the general counsel of “Fortune 1000” companies was undertaken in the fall of 2022. Its purpose was to help shed light on the actual practices of general counsel and the means by which corporate directors are apprised of their fiduciary duties under the law. This, in turn, will be used to help inform the proffered “best practices for general counsel” set forth in Part V below.

The text of the survey is set forth in Appendix A, and the raw data in Appendix B. Before analyzing the results of this survey, below, let us first review some of the most relevant other surveys taken of director education.

194. See supra text accompanying notes 138–45.
195. See supra Section III.B.i.
197. See infra Part V. Knowledge of current, actual practices is essential toward informing proposed best practices because, as per Thomas Aquinas, it would be unwise to propose standards for which the “multitude” would be unlikely to adhere. ST. THOMAS AQUINAS, SUMMA THEOLOGIAE: PRIMA SECUNDAE, 71–114, pt. 1-2, q. 96, art. 2, at 247 (Aquinas Inst. ed., Laurence Shapcote trans., 2017) (“[H]uman law is framed for a multitude of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.”).
198. See infra Section IV.C.
A. 2009 SCCE Survey

In an article published in 2009, Rebecca Walker reported upon a “benchmarking survey” commissioned by the Society of Corporate Compliance and Ethics.199 The survey consisted of just seven questions and generated 171 responses.200 It was not confined to public or even for-profit corporations, but was extended to any organization with a board of directors or similar such organ.201

To the general question of whether any “ethics and compliance” training was provided to the board, 70% of the respondents answered “Yes,” 30% answered “No.”202 Of those that did provide board training, 41% provided training with regard to “fiduciary duties” generally, with the following specific areas of fiduciary duty covered more or less frequently as follows:

- Corporate opportunities: 13% of respondents covered this topic;
- Conflicts of interest: 65% of respondents covered this topic;
- Compliance oversight: 70% of respondents covered this topic.203

As for who provides the board with training, 20% identified the general counsel, while 47% identified the firm’s chief compliance officer.204

Unfortunately, the underlying data from the 2009 survey, and indeed the actual survey itself, is not available, thereby limiting deeper analysis of the reported results.205

200. Id.
201. See id. at 229–30.
202. Id. at 230.
203. Id. at 231.
204. Id. at 230. “Other trainers include consultants and other professional trainers (7%), board members attending outside training (7%), outside counsel (3%) and other (non-specified) methods (15%).” Id.
205. In September 2017, the Society of Corporate Compliance and Ethics and the Health Care Compliance Association jointly surveyed organizations on board training, but the results as reported made it very difficult to draw conclusions with regard to the role played by general counsels in the training of directors of publicly traded corporations. See generally SOC’Y OF CORP. COMPLIANCE & ETHICS & ETHICS AND HEALTH CARE COMPLIANCE ASS’N, COMPLIANCE TRAINING AND THE BOARD 1 (Sept. 2017), https://assets.corporatecompliance.org/Portals/1/PDF/Resources/Surveys/2017-compliance-board-training-survey.pdf?ver=2017-10-10-165606-360 [https://perma.cc/755Q-3GLM]. Another survey conducted by the same two organizations in 2010 included clearer information on survey respondents but asked questions only tangentially relevant to our inquiry. See id. The 2010 survey was repeated in April 2018. Id.
B. 2009 Johnson & Garvis Survey

An ambitious survey on whether corporate officers are advised about their fiduciary duties by in-house counsel was undertaken in 2009 by professors Lyman Johnson and Dennis Garvis, with support from the Association of Corporate Counsel. For this survey, methodology and data are clearly furnished, making it the most useful previous survey available for our purposes. “Of the sixty-four usable [survey results received], twenty-six [came] from counsel at publicly held companies, twenty-seven from private companies and partnerships, nine from non-profit organizations, and two from ‘other’ entities.” Among the publicly held companies, 57.7% reported advising senior corporate officers as to “general fiduciary duty,” 46.2% reported advising senior corporate officers as to the “duty of loyalty,” and 46.2% the “duty of care.” With respect to directors, 61.5% of survey respondents reported advising directors “as to fiduciary duty,” with 75% reporting that such advice was the “same” as that provided to officers. Unfortunately, the survey did not probe into whether any sort of formal training or education was provided to officers (or directors), but rather simply whether in-house counsel “explicitly advise senior corporate officers . . . as to their fiduciary duties.”

C. 2022 Survey

i. Methodology

As indicated, a survey of the general counsel of “Fortune 1000” companies was undertaken in the fall of 2022 in conjunction with this project. The survey consisted of fifteen questions in total, but no single respondent would be presented with all fifteen questions because survey logic presented or omitted certain questions depending upon previous answers. In order to streamline the survey as much as possible, and in light of the fact that the recipients were attorneys at Fortune 1000 companies, I dispensed with the typical introductory questions regarding organization size, revenue, etc.

206. Johnson & Garvis, supra note 8.
207. See id. at 1111–17.
208. Id. at 1111.
209. Id. at 1113.
210. Id. at 1116.
211. Id. at 1127.
212. See supra text accompanying note 196.
213. For example, Question 3, “Who primarily provides new directors with formal training regarding their fiduciary duties?” would be omitted if the answer to Question 2, “Are new directors to your company provided with formal training regarding their fiduciary duties under corporate law (the duties of care and loyalty)?” was “No.” See infra Appendix B, Q2–Q3.
Respondents were not permitted to skip the questions presented to them (they were, however, permitted to answer “other” or “do not know” as applicable). When a respondent failed to complete a survey, the questions they did answer were retained in the survey’s results.

Survey recipients were contacted via email from a list purchased from RSA List Services. Of the 1,000 emails I sent, I received automated responses indicating that 259 of the addresses I used were either inaccurate or no longer active (such as “undeliverable,” “invalid email address,” “mailbox no longer valid,” or messages indicating that the recipient “no longer works” for the organization in question). After following up with RSA List Services, I received a replacement list and reached back out to those companies I was unable to contact initially. I supplemented these efforts with a solicitation of eighteen contacts within my personal LinkedIn network—individuals who worked at Fortune 1000 companies and whom I was comfortable soliciting in such a manner. By December 15th, I had received a total of forty-five responses. Of these, forty responses appear to have been complete.

Before delving into the survey’s contents and the substance of the responses received, a few words of qualification are in order. Although I endeavored to implement best survey practices, so as to obtain results that are both valid and reliable, I am far from a professional survey statistician. Indeed, I recognize a number of potential shortcomings in my methodology and, consequently, my results. The most significant would include the following:

- In my effort to maximize the number of responses, I utilized a platform that secured anonymity (Qualtrics). Consequently, I lacked any reasonable means by which to hold respondents responsible for their answers or to verify the accuracy of the responses I received. Through either human error or perhaps even an interest in skewing the survey in one direction or another, the responses received

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215. Email responses are on file with the Author.

216. This is based on the fact that Q14, the last multiple-choice question in the survey, received a total of forty responses. See infra Appendix B, Q14.

217. Gleaned from conversations with colleagues more experienced in such things, particularly Susan Saab Fortney, Irina Manta, and Jennifer Gundlach, and from my review of some of the relevant literature. See generally JOHN FOGLI & LINDA HERKENHOFF, CONDUCTING SURVEY RESEARCH (Donald N. Stengel, ed., 2018); ERNEST L. COWLES & EDWARD NELSON, AN INTRODUCTION TO SURVEY RESEARCH (Donald N. Stengel, ed., 1st ed. 2015); MATTHIAS SCHONLAU, RONALD D. FRICKER, JR. & MARC N. ELLIOT, CONDUCTING SURVEYS VIA E-MAIL AND THE WEB (2002).

may not reflect actual practices.\textsuperscript{219}

- Recognizing that some interested survey recipients might wish to delegate the responsibility for answering the survey to another, the survey link was forwardable. Consequently, it is possible that the link was forwarded and completed by someone outside of the Fortune 1000.\textsuperscript{220}

- The survey platform could not control for repeat responses by the same individual or for responses by different individuals within the same organization. This problem is compounded by the fact that I reached out to eighteen individuals from my LinkedIn network without knowing whether someone else from their corporation had already completed the survey on their organization’s behalf.\textsuperscript{221}

- As the survey was completely voluntary, response bias would seem to be inevitable: the survey was only completed by that subset of recipients inclined to complete surveys. Consequently, the results could reflect that subset of recipients, and not the Fortune 1000 generally.\textsuperscript{222}

As such, I cannot proffer the survey as strictly scientific. On the other hand, I do not believe it would be just to categorize the survey as essentially anecdotal. Rather, I suggest the survey occupy a space between those two poles and leave it to the reader to assign the weight to it that he or she deems fair.

For my part, I have faith in the survey’s respondents to have answered the questions posed responsibly. As such, I do believe that the survey’s results provide a valuable insight into the practices employed by a representative sampling of in-house counsel departments at Fortune 1000 companies.

ii. Results

As previously mentioned, the text of the 2022 survey is set forth in Appendix A, and the raw data in Appendix B. In this Section, I will cover the most salient substantive findings.

\textit{a. New Director Orientation}

Approximately 71\% of the respondents (twenty-nine out of forty-one) reported that new directors to their company received “formal training

\textsuperscript{219} \textit{See} \textsc{Fogli \& Herkenhoff}, \textit{supra} \textit{note} 217, at 12.

\textsuperscript{220} \textit{See id.} at 18.

\textsuperscript{221} \textit{See id.} Given that my initial survey was addressed, via a mass email distribution, to 1000 addresses, and that my personal outreach was only to eighteen individuals, I considered the potential benefit of receiving additional responses worth the risk that some of those responses might hail from organizations from which an answer had already been received.

\textsuperscript{222} \textit{See id.} at 15.
regarding their fiduciary duties under corporate law (the duties of care and loyalty). 223 Such training was primarily provided by the company’s own general counsel’s office according to 75% of the respondents. 224 For the remaining 25% of respondents, such training was provided by outside counsel (as per four of the respondents) or by some other means (as per three of the respondents). 225

The next question asked respondents to identify the components included in the training of new directors. 226 The list from which they could choose included the following:

- In-person presentation(s)
- Webinars
- Distribution of hard-copy materials and/or manuals
- Distribution of electronic-copy materials and/or manuals
- Online coursework
- Other
- Do not know 227

For this question (Q4), respondents were able to select more than one answer (that is, they could identify multiple components of their company’s training programs). 228 Since the survey report’s calculations were based upon the total number of answer selections (sixty-seven) rather than the total number of individuals responding to the question (twenty-eight), 229 the statistics

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223. See infra Appendix B, Q2.
224. See infra Appendix B, Q3.
225. See infra Appendix B, Q3. As per the narrative responses supplied by two of the respondents who selected “other” as their answer choice: (1) “New Directors meet with our CEO and then each of our senior management team to learn about their area of responsibility,” and (2) “The general counsel and the company secretary provide the training.” See infra Appendix B, Q3. The first of these responses suggests that the training in question might not necessarily cover corporate fiduciary duties. However, the survey logic only presented this follow-up question (“Who primarily provides new directors with formal training regarding their fiduciary duties?”) if the answer to the previous question had indicated that new directors are provided with formal training regarding fiduciary duties. See infra Appendix B, Q2–Q3. The second of these responses should, I suggest, be understood as adding to those answers indicating that “the general counsel’s office” primarily provides new directors with formal training, thereby raising the percentage of respondents with that answer choice up from 75% to approximately 79%. See infra Appendix B, Q3.
226. See infra Appendix B, Q4.
227. See infra Appendix B, Q4.
228. See infra Appendix B, Q4.
229. Unfortunately, the exact number of respondents to this question (Q4) is unknown. But it must be either twenty-eight or twenty-seven given the data associated with this and the previous question (Q3). See infra Appendix B, Q3–Q4. For this question, one answer choice received twenty-seven responses, so at least twenty-seven individuals responded to this question. See infra Appendix B, Q4. For the previous question, which was logically linked to this one, twenty-eight individuals
provided by the survey report presented in Appendix B should be supplemented. For I am less concerned with the proportion out of the total answer choices that a particular answer selection represents than with how many of the individuals answering the survey identified a particular answer choice as associated with their company’s training program. Consequently, I set forth below different calculations based upon the same data in order to better elucidate the focus of my inquiry:

**Q4: What are the components of formal training of directors regarding their fiduciary duties (select all that apply):**

<table>
<thead>
<tr>
<th>Answer Selection</th>
<th>Percentage of Respondents</th>
<th>Count/28</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-person presentation(s)</td>
<td>96.43%</td>
<td>27</td>
</tr>
<tr>
<td>Webinars</td>
<td>7.14%</td>
<td>2</td>
</tr>
<tr>
<td>Distribution of hard-copy materials and/or manuals</td>
<td>64.29%</td>
<td>18</td>
</tr>
<tr>
<td>Distribution of electronic-copy materials and/or manuals</td>
<td>60.71%</td>
<td>17</td>
</tr>
<tr>
<td>Online coursework</td>
<td>3.57%</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>7.14%</td>
<td>2</td>
</tr>
<tr>
<td>Do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
</tbody>
</table>

The nearly universal use of in-person presentations underscores, I suggest, the commitment to director education on the part of those companies that opt for formal training of incoming directors. The continued use and distribution of hard-copy materials as a component of director training probably yields no additional insights given that this probably flows ineluctably from the continued dominance of in-person training.

Recall that approximately 29% of the survey’s respondents (twelve out of forty-one) indicated that their companies did not provide formal training for new directors. These respondents were asked, “[H]ow are new directors expected to know and understand their fiduciary duties . . . ?” As with Q4, this question permitted respondents to select all applicable answer choices. And also as with Q4, the survey report provides results that are not as useful as

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230. See infra Appendix B, Q4; see also supra text accompanying note 229.
231. See infra Appendix B, Q2.
232. See infra Appendix B, Q5.
233. See infra Appendix B, Q4–Q5.
could otherwise be on account of how the report calculates the percentages. Consequently, I again set forth different calculations based upon the same data in order to better elucidate the focus of my inquiry:

**Q5: If new directors are not provided with formal training, how are new directors expected to know and understand their fiduciary duties (select all that apply)?**

<table>
<thead>
<tr>
<th>Answer Selection</th>
<th>Percentage of Respondents</th>
<th>Count/12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Through past experience and qualifications</td>
<td>83.33%</td>
<td>10</td>
</tr>
<tr>
<td>Through ongoing, formal continuing education efforts</td>
<td>83.33%</td>
<td>10</td>
</tr>
<tr>
<td>Through self-study</td>
<td>58.33%</td>
<td>7</td>
</tr>
<tr>
<td>Other</td>
<td>25.00%</td>
<td>4</td>
</tr>
</tbody>
</table>

The survey did not drill down further upon the nature of “past experience and qualifications,” nor how it is measured or assessed. Presumably this is gleaned from the director’s resume and explored as part of the appointment process. Fortunately, the high proportion of respondents indicating that “ongoing, formal continuing education efforts” are part of their company’s protocols would hopefully remedy deficiencies that newly appointed directors might have regarding their understanding of fiduciary duties.

b. Ongoing Director Training

In response to Question 6, 75% of the respondents (thirty out of forty) indicated that regardless of any potential initial formal training, directors received “ongoing or periodic formal training regarding their fiduciary duties.” Recall that among those respondents who indicated that their newly appointed directors did not receive any formal training upon appointment to the board, ten out of twelve reported that such directors were nevertheless subject to “ongoing, formal continuing education efforts.” If we tease those numbers

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234. See infra Appendix B, Q5; see also supra text accompanying note 229 (noting the distinction between the total number of answer selections and total respondents).

235. See infra Appendix B, Q5.

236. As stated previously, the exact number of respondents to this question cannot be known with certainly. See supra text accompanying note 229. The number “12” is being assumed because this question (Q5) is posed to the twelve respondents of an immediately preceding question (Q2, immediately preceding for them on account of the survey’s logic). See infra Appendix B, Q2, Q5.

237. See infra Appendix B, Q5–Q15.

238. See infra Appendix B, Q5.

239. See infra Appendix B, Q6.

240. See infra Appendix B, Q2, Q5; see also supra text and table accompanying note 236.
out from the results of Question 6, we presumably isolate the responses to those whose companies require a formal orientation program for new directors regarding fiduciary duties. Among this subset, therefore, we find that twenty out of twenty-eight respondents (71.43%) report that their companies provide ongoing or periodic formal training of directors regarding their fiduciary duties. The approaches of the two sub-sets can be presented as follows:

<table>
<thead>
<tr>
<th>Percentage</th>
<th>Raw Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Companies that provide initial director training on fiduciary duties</strong></td>
<td>71.43% provide ongoing or periodic formal training</td>
</tr>
<tr>
<td><strong>Companies that do not provide initial director training on fiduciary duties</strong></td>
<td>83.33% provide ongoing or periodic formal training</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>75% provide ongoing or periodic formal training</td>
</tr>
</tbody>
</table>

Noteworthy is that those corporations that forgo a formal director orientation program covering fiduciary duties are more likely to (by an 83% to 71% margin) provide formal ongoing director education covering fiduciary duties. This suggests that such companies do not necessarily discount the importance of such training, but rather elect to provide for it differently— with a greater emphasis on ongoing versus initial efforts. Put differently, the data suggests that corporations neglecting a formal director orientation program covering fiduciary duties are not apparently doing so out of some lesser regard for the importance of such training. If that were the case, we would, I suggest, expect these corporations to exhibit a lower rate of ongoing director training on fiduciary duties as well.

Similar to the coupling of Questions 3 and 4, Question 6 was followed by Question 7, which asked respondents to identify the components included in

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241. See infra Appendix B, Q2–Q3, Q5–Q6. The number “28” as the total responses from those who indicated the existence of a formal orientation program for directors at their companies is consistent with the number of respondents who answered questions from that subset. See supra text accompanying note 229.

242. See infra Appendix B, Q6.
their ongoing director training. The list from which they could choose included the following:

- In-person presentation(s)
- Webinars
- Distribution of hard-copy materials and/or manuals
- Distribution of electronic-copy materials and/or manuals
- Online coursework
- Other
- Do not know

Question 7 was another one for which respondents were able to select more than one answer. As with those prior questions, I set forth below different calculations based upon the data obtained:

Q7: What is the form of the ongoing or periodic formal training that directors receive regarding their fiduciary duties?

<table>
<thead>
<tr>
<th>Answer Selection</th>
<th>Percentage of Respondents</th>
<th>Count/30</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-person presentation(s)</td>
<td>93.33%</td>
<td>28</td>
</tr>
<tr>
<td>Webinars</td>
<td>20.00%</td>
<td>6</td>
</tr>
<tr>
<td>Distribution of hard-copy materials and/or manuals</td>
<td>43.33%</td>
<td>13</td>
</tr>
<tr>
<td>Distribution of electronic-copy materials and/or manuals</td>
<td>56.67%</td>
<td>17</td>
</tr>
<tr>
<td>Online coursework</td>
<td>6.67%</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>13.33%</td>
<td>4</td>
</tr>
<tr>
<td>Do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
</tbody>
</table>

The results from Q7 largely mirror those from Q4, which had asked respondents to identify the components of formal training for new directors. The most notable difference is the increased use of webinars (from 7% to 20%) and online coursework (from 4% to 7%) with regard to the ongoing training of directors.

Seeking to drill deeper into the practice of ongoing director training regarding fiduciary duties, the survey asked about the frequency of such

243. See infra Appendix B, Q7.
244. See infra Appendix B, Q7.
245. See infra Appendix B, Q7.
246. See infra Appendix B, Q7.
247. See infra Appendix B, Q7.
248. See infra Appendix B, Q4.
training. The most commonly selected answer (30%, or nine out of thirty) was that such training was provided “only when necessary due to the occurrence of particular corporate matters or undertakings.” Closely related to this was the answer choice “only when necessary due to changes in law/regulation,” selected by 7% (or two out of thirty) of the respondents.

The next most common answer (27%, or eight out of thirty) was “regularly scheduled training, approximately once per year.” It should be noted, however, that one of the two respondents who answered “other” explained: “Annually and additionally as necessary.” Consequently, it would seem that nine out of thirty, or 30% (rather than eight out of thirty, or 27%) of the respondents reported that their companies conduct regularly scheduled training approximately once a year.

Few organizations engage in regularly scheduled director training more than once a year (10%), and nearly double that amount engage in regularly scheduled training less than once a year (17%). Only one respondent (3%) indicated that training was provided “only when requested by the board.”

Thus, it appears that for a majority of companies surveyed, the “ongoing or periodic training” of directors with regard to fiduciary duties is something regularly scheduled (60%, or eighteen out of thirty). For a minority of the companies surveyed, such training is only implemented “when necessary” (37%, or eleven out of thirty) or when “requested by the board” (3%, or one out of thirty).

Question 10 asked respondents to identify how directors are “expected to know and understand their fiduciary duties” in those organizations in which periodic training regarding such duties is not provided. Respondents were invited to select all choices that applied, which, once again, requires a conversion of the calculated results from the survey into re-calculated results that are more useful.

249. See infra Appendix B, Q9.
250. See infra Appendix B, Q9.
251. See infra Appendix B, Q9.
252. See infra Appendix B, Q9.
253. See infra Appendix B, Q9.
254. See infra Appendix B, Q9.
255. The number “18” is the total of those who indicated “regularly scheduled training, more than once per year” (3), plus “regularly scheduled training, approximately once per year” (8), “regularly scheduled training, less frequently than once per year” (5), the two “other” responses which indicated via text “[a]nnually and additionally as necessary” and “periodic—varies as to time” (2). See infra Appendix B, Q9.
256. See infra Appendix B, Q9.
257. See infra Appendix B, Q10.
258. See infra Appendix B, Q10; see also supra text accompanying note 229.
Q10: If directors are not provided with ongoing or periodic training regarding their fiduciary duties, how are directors expected to know and understand their fiduciary duties (select all that apply)?

<table>
<thead>
<tr>
<th>Answer Selection</th>
<th>Percentage of Respondents</th>
<th>Count/10</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directors are expected to know and understand their fiduciary duties based upon their past experience, qualifications, and self-study</td>
<td>100.00%</td>
<td>10</td>
</tr>
<tr>
<td>Through an initial orientation and training upon joining the board</td>
<td>40.00%</td>
<td>4</td>
</tr>
<tr>
<td>Directors receive legal advice regarding their duties on a case-by-case basis, as becomes necessary with regard to particular corporate matters or undertakings</td>
<td>70.00%</td>
<td>7</td>
</tr>
<tr>
<td>Such duties are explained whenever a director (or the board) requests an explanation</td>
<td>60.00%</td>
<td>6</td>
</tr>
<tr>
<td>Other</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
</tbody>
</table>

The answers received in response to Question 10 are not surprising. In those firms that do not provide ongoing or periodic director training regarding fiduciary duties, it is presumed that the directors already know and understand such duties—100% of the respondents indicated that. Although most responded that directors could be expected to know their fiduciary duties as a result of legal advice provided on a “case-by-case basis” (70%) or upon “request[]” (60%), presumably those percentages are not higher because directors are already expected to know and understand their duties—thereby making such interventions unnecessary.

c. Role and Status of General Counsel

The closing questions of the survey probed the role and status of general counsel at the respondents’ corporations.
For a vast majority of the respondents (93%, or thirty-seven out of forty),
general counsel at their firm is “an officer but not a director of the
corporation.”264 Of those general counsels who were not directors (thirty-nine
out of forty), 85% were nevertheless required to regularly attend meetings of
the board (thirty-three out of thirty-nine).265 Of those general counsel who were
not required to attend board meetings (five out of thirty-nine), two (40%)
attended most, while two (40%) attended less than half.266

Finally, respondents were asked whether “general counsel [met] with
independent directors of the board apart from his/her meetings with the board
generally.”267 Most respondents indicated “yes, but only upon request” (55%,
or twenty-two out of forty).268 A quarter of respondents indicated that such
meetings occurred “pursuant to a regular schedule” (25%, ten out of forty) and
some indicated that such meetings do not occur (13%, or five out of forty).269
Of the three respondents who indicated “other,” one wrote, “yes–as necessary,”
and another wrote, “Yes, as needed or requested.”270 These should be added to
the “yes, but only upon request” response, bringing that figure up to 60% (or
twenty-four out of forty).

The responses suggest, as one would expect, a robust presence on the part
of the general counsel vis-à-vis the corporate board of directors. It also indicates
that general counsel are available to and do meet frequently with outside
directors—and sometimes regularly so pursuant to a schedule.

V. PROPOSED BEST PRACTICES FOR GENERAL COUNSEL

Given the obligations facing general counsel, both legal and ethical, and
informed by an understanding of prevailing industry practices, how should
attorneys, offices, and firms assuming that role best fulfill their responsibilities?

As a threshold matter, virtually all of the best practices pertaining to the
competent and ethical practice of law pertain to general counsel as well. Thus,
texts, treatises, and articles on the professionally responsible practice of law are
helpful and appropriate sources of advice for general counsel, and ought to be
consulted when necessary and internalized as far as capable.271 In this Part, we
shall draw from this corpus of literature, in addition to other sources, to fashion

264. See infra Appendix B, Q11.
265. See infra Appendix B, Q11–Q12.
266. See infra Appendix B, Q13.
267. See infra Appendix B, Q14.
268. See infra Appendix B, Q14.
269. See infra Appendix B, Q14.
270. See infra Appendix B, Q14.
271. See, e.g., RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. §§ 14–20 (AM. L. INST.
2000).
a series of proposed best practices particular to corporate general counsel. These will be organized into four general headings: “Expertise,” “Know Your Client,” “Management of Conflicts,” and “Provision of Legal Advice and Training.” Where relevant, the 2022 survey results (Survey) discussed in Part IV will be incorporated into this analysis.

A. Expertise

As previously discussed, the field of corporate law is both broad and complex. An additional layer of complexity must be added if the corporation in question is publicly traded, in the imposition of federal (and state) securities laws. Still more complexity may be added depending upon the industry of the corporation’s business, for the fields of insurance, finance, banking, and a host of others are subject to heightened regulation and regulatory oversight. If the corporation wields “market power,” as per the antitrust laws, then its conduct will be subject to standards and limitations not applicable to firms lacking market power. If the company operates in multiple jurisdictions, the laws of various states would most likely apply to its business. And if the company engages in international commerce, the laws of foreign nations, particular trading zones, and rules derived from treaties (such as the United Nations Convention on Contracts for the International Sale of Goods, to provide but one example) all might become applicable.

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272. See supra Section IV.C.ii.
273. See Graves-Poller, supra note 134, at 11–12 and accompanying text.
274. See, e.g., Daniel Hemel & Dorothy S. Lund, Sexual Harassment and Corporate Law, 118 COLUM. L. REV. 1583, 1635 (2018) (“Aside from the corporate law of a company’s state of incorporation, publicly traded companies are governed by federal (as well as state) securities law. In some instances, federal securities laws saddle public companies with affirmative duties to disclose certain information to shareholders.”).
In sum, corporate general counsel must possess expertise not only in the fundamental aspects of law applicable to all business corporations but may very well need proficiency in other substantive fields of law as well, hailing from multiple jurisdictions and sources.

Thus, the general counsel of a corporation must be an individual who has received sufficient training and possesses sufficient experience in, at a minimum, corporate law and those substantive areas of law relevant to his or her corporate client’s industry. Depending upon the breadth of the client’s operations and undertakings, which could span several fields of business, no one individual might be capable of possessing the necessary expertise. In such situations, a general counsel must have at his or her disposal an office of attorneys sufficient to provide the requisite expertise in combination, or ready access to outside counsel capable of furnishing the same. Under such circumstances, one of the general counsel’s most critical abilities becomes that of flagging issues and identifying attorneys capable of handling them. For although the general counsel may lack the expertise necessary to personally resolve many of his client’s needs, he needs to possess that core modicum of expertise essential to grasping the nature of such needs. This, in turn, enables the general counsel to quickly and efficiently refer the matter to attorneys suitable for providing the advice sought. In sum, a key attribute of general counsel is not only what he knows, but whom he knows. A deep bench of subject matter experts, whether as part of the general counsel’s own personal office, or otherwise readily accessible, is most likely indispensable.\textsuperscript{280}

B. Know Your Client

Conjoined to legal expertise is factual expertise. General counsel must know their clients’ business in order to render appropriate advice.\textsuperscript{281} For unlike attorneys employed or otherwise retained to assist with a particular transaction or situation, general counsel is especially entrusted with looking beyond the client’s present predicament to future challenges and opportunities (as best can be foreseen) that might be impacted by decisions made today. Positions taken in litigation, or language acceded to in current contractual commitments, could either seriously hinder or, alternatively, bolster the client’s success tomorrow. Such perspective cannot be attained without a thorough understanding of the

\textsuperscript{280} See generally \textsc{Gardner, supra} note 142.

\textsuperscript{281} \textsc{Villa, supra} note 109, § 3:12 (“[Corporate counsel] has a [] duty to be [thoroughly] informed [about the entity represented].”).
client’s business—including an appreciation of its long-term plans and strategies.

Unlike legal expertise, corporate counsel’s grasp of his or her client’s business cannot be readily outsourced. That said, not every minute detail of client operations needs to be fully mastered. Analogous to the necessary legal expertise that must be possessed, it would suffice for a general counsel to have a strong enough grasp to recognize when a given situation implicates, or might reasonably implicate, some part of his or her client’s business. Such recognition would enable the necessary follow up, investigation, and questioning essential to resolve the potential predicament.

A newly appointed general counsel, therefore, certainly has a significant amount of learning to do with regard to his or her client. (Presumably, this burden would be diminished, to a greater or lesser degree, if the individual was promoted to the position from within the corporation.) This ought to be undertaken via a rigorous, systematic review of the client’s business. It is difficult to imagine that such a review could be accomplished by a study of documents and materials alone (although such a study would, most likely, be itself essential). Consequently, hours if not days of interviews and conversations with key corporate personnel would typically be required. Unfortunately, this orientation process could easily take several weeks to complete, during which time the corporate client would be exposed to substantial risk by virtue of the fact that its general counsel is not yet up to speed. As such, the importance of an appropriate transition period, during which time the outgoing general counsel remains engaged while the new one learns the ropes, is optimal. Indeed, the importance of this transition period is such that ongoing general counsel is duty bound to cooperate. This is reflected in Model Rule 1.16(d), which states that “[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests,” such as “giving reasonable notice to the client” and “allowing time for employment of other counsel.”

C. Management of Conflicts

Every lawyer must be on guard against undertaking a representation, or other course of action, that would give rise to a conflict of interest between the

282. See supra Section V.A.
283. Since a general counsel’s representation is ongoing, his efforts to remain abreast his client’s business must be ongoing as well. See, e.g., GARDNER, supra note 142, at 4.
284. MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS’N 2020).
285. MODEL RULES OF PRO. CONDUCT r. 1.16 cmt. 9 (AM. BAR ASS’N 2020).
lawyer and his or her client(s), including those in which the interests of one client run contrary to the interests of another.286 General counsel is no different. But as the chief legal officer of an organization, general counsel must also be sensitive to conflicts of interest arising among the various constituents within a single corporate client.287 This is not a problem most other lawyers regularly confront.

Fortunately, procedures for how to address this issue have been addressed fairly extensively, and best practices already exist. It is important that general counsel, and those working within the general counsel’s office, adhere to these practices.

The Model Rules (Rule 1.13(f)) flag the issue, and provide some minimally necessary guidance:

In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.288

The comments to the Model Rules provide further help, reminding attorneys that they “may not disclose to [corporate] constituents information relating to the representation” of the corporation “except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6 [regarding client confidentiality].”289

When general counsel is also an employee of the corporation, at least it is clear, conceptually, to whom his or her duties are owed (to the corporation). When general counsel is not such an employee, but rather retained from a law firm, this identification ought to be clearly articulated in counsel’s engagement letter.290

Frequently, “[w]here the interests of an entity and the individuals managing or controlling the entity converge, the lawyer’s duty to represent the entity does not present a conflict of interest for corporate counsel.”291

286. See MODEL RULES OF PROF. CONDUCT r. 1.7, 1.8(g) (AM. BAR ASS’N 2020).
287. MODEL RULES OF PROF. CONDUCT r. 1.7, 1.13(f)–(g) (AM. BAR ASS’N 2020).
288. MODEL RULES OF PROF. CONDUCT r. 1.13(f) (AM. BAR ASS’N 2020).
289. MODEL RULES OF PROF. CONDUCT r. 1.13 cmt. 2 (AM. BAR ASS’N 2020).
the lawyer recognizes that the interests of a particular individual within the enterprise and the corporation entity itself “do or may diverge.”

At this point, it is essential that “the lawyer ... inform both the entity and the individuals involved that the lawyer’s allegiance is to the entity.” Further, depending upon how clear the divergence appears to be, “the individual should be encouraged to consult independent counsel to assist in deciding whether to consent to representation by the organization’s counsel.” Given the importance of such a warning, it ought to be memorialized in writing.

The difficulty of such situations is compounded when the individual in question is a corporate control person—not just any employee of the corporation, but rather a high-ranking officer or a director. For such individuals are precisely the persons that corporate counsel would ordinarily turn to in order to discharge his or her duty to the entity, or to ascertain the entity’s interests. As per the Model Rules, the attorney’s obligations in such a situation include: (a) informing the individual of the potential conflict of interest, (b) suggesting that the individual consider retaining his or her own counsel, and (c) escalating the situation to a higher level of authority within the corporation for guidance—possibly the board of directors itself.

Even thornier can be situations where corporate counsel is herself a director of the corporation. Although this is not precluded by the Model Rules, such an appointment can foreseeably give rise to conflicts of interest requiring the individual’s recusal as either corporate counsel, corporate director, or both. It would appear, therefore, that although general counsel’s attendance at board meetings is generally advisable, her service as an actual director may not be.

For these and other reasons, it is vital that corporate counsel have an excellent working relationship with all of the corporation’s various constituencies, but especially with the corporation’s directors—the highest echelon of authority within the organization. Such relationships require

292. Id.
293. Id.
294. Id.
295. Id.
296. See Jones, supra note 290; VILLA, supra note 109, § 3:14.
297. See supra text accompanying notes 119, 289–94.
298. Jones, supra note 290, § 12.4.1.
299. Id.
300. See infra text accompanying note 305.
301. See MOORHEAD, VAUGHAN & GODINHO, supra note 147, at 58–60.
ongoing cultivation through regular meetings and numerous interactions, both formal and informal. A special effort must be made to develop a rapport with the corporation’s independent directors, as these individuals would most likely be those to whom counsel would turn in the event of the most critical of corporate crises. Indeed, the ABA Task Force on Corporate Responsibility suggested that best practices would entail “routine, periodic private meetings between the general counsel and a committee of independent directors.”

Thus, although 55% of the Survey’s respondents indicated that general counsel met with independent directors “upon request,” far better would be the practice of those 25% of respondents who indicated that meetings between general counsel and independent directors occurred pursuant to a regular schedule.

Barring some compelling reason, general counsel should be a fixture at board meetings—someone whom directors grow comfortable confiding in and receiving advice from. The eruption of a crisis within the corporation must not be the first time that directors and key officers become acquainted with the organization’s general counsel. As one pair of commentators explained:

Whether or not the General Counsel is a member of the board, the General Counsel should be part of board culture. This means that each individual director should forge a relationship with their General Counsel, feeling confident that he or she can rely on the General Counsel for advice when making decisions.

Fortunately, to the extent that the Survey’s results are accurate and representative, this comports with current practice: 85% of respondents reported that general counsel were required to attend board meetings; of those who were not required, 33% attended most meetings nonetheless.

As becomes quickly apparent, the general counsel position requires skills and abilities far beyond those acquired in law school. Social intelligence, political acumen, sound legal judgment, and no small degree of courage will typically be essential to navigating perilous scenarios rife with that combination.

303. Villa, supra note 109, § 3:13; accord Moorhead, Vaughan & Godinho, supra note 147, at 57.

304. See supra Section IV.C.ii.c; see infra Appendix B, Q14.

305. This is especially so in the United States, given the robust protections afforded to attorney-client communications; determining what should or should not be discussed with general counsel may be subject to a different calculus in other foreign jurisdictions. Moorhead, Vaughan & Godinho, supra note 147, at 59–60.

306. Veasey & Millstein, supra note 10, at 1; accord Moorhead, Vaughan & Godinho, supra note 147, at 57.

307. See supra Section IV.C.ii.c; see also infra Appendix B, Q12–Q13.

308. Indeed, such skills are beneficial to practically all attorneys and most individuals. See Wendy L. Werner, Social Intelligence: Another Key to Success, LAW PRAC., Jan.–Feb. 2014, at 56–57.
of delicacy, discretion, and firmness indispensable to the health of the corporation and the protection of the individuals involved. These ought to be considered indispensable qualifications for anyone seeking to serve as general counsel of a corporation.

D. Provision of Legal Advice and Training

As with all attorneys, general counsel is duty bound to render legal advice marked by sufficient expertise, reflection, factual knowledge, and judgment. Given his or her particular client, this would entail discussions and guidance on the following subjects:

- Board and committee structure, composition and processes;
- Identification and compliance with fiduciary duties;
- Development and implementation of board committee charters, corporate governance guidelines, codes of conduct and other compliance policies and procedures;
- Interpreting “auditor independence” requirements;
- Structuring and conducting board and committee self-evaluations;
- Compliance with specific corporate governance listing requirements of the applicable securities exchange;
- Management assessments of internal controls;
- Executive officer and director compensation;
- Structuring and conducting internal investigations;
- Indemnification, insurance and other liability protections for directors and officers; and
- Responding to shareholder activism and securities litigation.

In providing legal advice, every attorney serves an educative function. For the general counsel, however, this function must be more formalized. Indeed, “[g]eneral counsel serve as educators at the highest levels of their organizations and set in motion the programs designed to alert employees at all levels to their legal obligations.” Such undertakings would appear to be an indispensable

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309. See BROOKE WUNNICKE, ETHICS COMPLIANCE FOR BUSINESS LAWYERS § 12.5, at 287 (1987). This latter concern (over the welfare of particular individuals) is only strictly an obligation on the part of the attorney (here, the general counsel) to the extent required by the best interests of the organization. See id.

310. See supra Section III.B.

311. GUTERMAN, supra note 76, § 221:255(2).

component of general counsel’s overarching obligation to help his or her organization manage legal risks.\textsuperscript{313} New board members, in particular, must receive an appropriate education as to their duties—as imposed by state and federal law, in addition to any others set forth in the corporate charter.\textsuperscript{314} Indeed, “directors have not only a legal but also a professional responsibility to understand their fiduciary duties and to act in accordance with them.”\textsuperscript{315} And whereas senior executive officers of public companies have long been expected to have benefited from prior “specialized training, often represented by the M.B.A.,” directors have not traditionally been subject to such expectations.\textsuperscript{316} This is problematic, especially in light of the “increased obligations, demands and expectations now placed on the public company director.”\textsuperscript{317} Thus, as one commentator has explained, a “thorough orientation” program for new directors is critical:

    Directors need to be well informed about the factual and legal aspects of the corporation’s operations and the industries or external climate in which the corporation operates. In addition, the board should ensure proper education of officers and employees through the development and enforcement of corporate policy statements which define appropriate standards of conduct in sensitive or misunderstood areas, such as conflicts of interest, ethical standards, political contributions, employment practices and confidentiality of corporate or client information.\textsuperscript{318}

client constituents is a core element of proactive lawyering in American corporations that “animates entire legal departments.”\textsuperscript{\textsuperscript{313}}

313. See MOORHEAD, VAUGHAN & GODINHO, supra note 147, at 118.
314. GUTTERMAN, supra note 76, § 344:117 (underscoring the necessity of orientation and training but not clearly identifying ownership of this responsibility). Indeed, new board members are increasingly clamoring for such orientation. See Andrea Vittorio, Corporate Boards’ Youngest Members Want Better Orientation, BLOOMBERG LAW (Feb. 19, 2019, 9:06 AM), https://news.bloomberglaw.com/esg/corporate-boards-youngest-members-want-better-orientation-7 [https://perma.cc/9694-TSFW].
315. VEASEY & MILLSTEIN, supra note 10, at 1.
316. FANTO, supra note 71, § 1:1. In response to this, the National Association of Corporate Directors has launched, in the fall of 2019, an examination-based credentialing program for new or aspiring directors. See Andrea Vittorio, Directors to be Tested on Whether They’re Corporate Board-Ready, BLOOMBERG LAW (May 8, 2019, 5:01 AM), https://news.bloomberglaw.com/esg/directors-to-be-tested-on-whether-theyre-corporate-board-ready [https://perma.cc/CAR6-6ZLG].
317. FANTO, supra note 71, § 1:1.
318. KNEPPER & BAILEY, supra note 69, § 1.02. The commentators identify the “board” as responsible to seeing to this orientation, and as a matter of corporate governance, identifying the board as ultimately responsible is correct. Indeed, some have suggested that “a governance committee should be established to ensure that directors have the proper training for their job and discharge all of the
This training should focus on “directors’ fiduciary duties—principally[, the duties of loyalty and care,” and also cover “individual areas of risk relevant to their position.”319 This would extend to “insider trading and securities law,” along with the directors’ oversight obligations.320

Fortunately, director orientation, as well as continuing education, are “[i]ncreasingly . . . considered components of effective board governance,”321 The New York Stock Exchange requires listed companies to “address director orientation and continuing education,” and rating agencies have “taken note of the importance of director education programs.”322 Thus, at an absolute minimum, general counsel must apprise directors of their duty to ensure the existence of an adequate director orientation and training program, whether or not the general counsel actually spearheads those orientation and training efforts.

A good example of such a program is that which has been adopted by Dow Chemical Company. In the words of its Chairman and CEO:

We have a very robust new director orientation program that includes a review of various governance documents, tours of Dow facilities, one-on-one meetings with Dow executives and subject matter experts, and other transition activities. New Directors are given a binder of Dow Governance Background Material as a part of [their] orientation.323

As indicated, such education should not end at the directors’ orientation, but continue throughout their tenure.324 On some regular schedule, directors should be reminded of their duties and obligations, and apprised of changes in the law affecting them. When particularly implicated in a given situation, these duties must, of course, be underscored yet again, along with advice on their application in context.

activities necessary for effective governance.” GUTTERMAN, supra note 76, § 72.15. But this responsibility is certainly shared with the corporation’s chief legal officer, its general counsel. Further, implementation of a program of legal education must fall squarely upon the shoulders of the general counsel, or under his or her supervision. Ideally, the board would be thoroughly engaged in these efforts, and take a particular interest in seeing to their execution.

319. Kaplan & Walker, supra note 21, at 8.
320. Id.
322. Id.
324. See GUTTERMAN, supra note 76, § 344:118.
The importance of director orientation, training, and continuing education is difficult to overestimate. For even the most well-intentioned, dedicated director is unlikely to succeed without proper and adequate guidance as to his or her legal obligations. As such, general counsel’s neglect in providing such guidance—not simply with regard to specific matters but generally, to ensure that directors comprehend their fiduciary duties and other legal obligations—should be deemed a “failure to communicate” or a “failure to advise” in violation of the Model Rules (1.4 and 2.1, respectively), and potentially grounds for finding legal malpractice as well. As alluded to previously, to the extent that general counsel is not in-house, the terms of his or her engagement should address this important issue and firmly establish expectations with regard thereto. In the absence of clarity on this issue, the better approach would be to presume such obligations are indeed incumbent upon the attorney by virtue of his or her position as general counsel. At an absolute minimum, barring anything contrary contained in the engagement letter, general counsel should be responsible for ensuring that directors have benefited from that degree of training and education necessary to effectively digest whatever legal advice is being provided to them by general counsel with regard to a given situation or matter.

General counsel should not limit their educational and training efforts to directors alone, but should also be sure other critical corporate constituents receive such guidance as well. “As the principal in-house legal advisor for the client, a general counsel has the responsibility to find ways to inform business managers and constituents throughout the company about what they can and cannot lawfully do as they pursue business objectives.”

Taking a page from the field of compliance, general counsel should have at their disposal a variety of tools to accomplish their ends, including the preparation and dissemination of tailored training manuals, reference materials, workshops, presentations, and possibly external seminars as well. In other words, some of the very same approaches typically used to ensure that rank-

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326. *MODEL RULES OF PRO. CONDUCT* r. 1.4, 2.1 (AM. BAR ASS’N 2020).


328. *See supra* Section III.D.


330. *Id.* at 1005.

and-file employees are educated as to their various obligations should be applied to the upper levels of corporate management.332

 Fortunately, the Survey suggests that general counsel appreciate and take seriously their obligations to oversee the education of directors regarding their fiduciary duties.333 With regard to the critical question of new director orientation, the vast majority of respondents reported that orientation included coverage of fiduciary duties and was conducted by the general counsel (75%).334 The overwhelming majority indicated that such training was conducted in-person (96%),335 and most indicated that the training was accompanied by the distribution of hard copy (64%) and electronic copy (60%) materials.336 Over 70% of respondents indicated that, regardless of any initial training, directors received ongoing training regarding their fiduciary duties,337 which, again, was primarily in-person (93%) and commonly featured the use of hard copy (43%) and electronic copy (57%) materials.338 One-third (30%) of respondents indicated that this ongoing training occurred approximately once per year.339

 With regard to those companies that do provide fiduciary duty training for their directors, the vast majority of respondents indicated that an understanding of these duties was expected by virtue of the director’s past or qualifications (83% of respondents in organizations in which no initial training is provided indicated this,340 along with 100% of respondents in organizations in which no ongoing training is provided).341 The survey did not drill down deeper into the basis or verification of these expectations, and as such, it is difficult to assess the degree to which this course of action is a reasonable substitute for director orientation undertaken by the corporation itself. Fortunately, 83% of these same respondents indicated that their organizations nevertheless provided “ongoing or periodic formal training” of their directors.”342

332. See BASRI, supra note 76, § 1.02.
333. See supra Section IV.C.ii.a.
334. See supra Section IV.C.ii.a.
335. See supra Section IV.C.ii.a.
336. See supra Section IV.C.ii.a.
337. See supra Section IV.C.ii.b.
338. See supra Section IV.C.ii.b.
339. See supra Section IV.C.ii.b.
340. See supra Section IV.C.ii.a.
341. See supra Section IV.C.ii.b.
342. See supra Section IV.C.ii.b.
VI. CONCLUSION

The attorneys who serve as general counsel at America’s Fortune 1000 companies take on responsibilities second to few others in our society. Upon their shoulders is heaped layer upon layer of obligations—obligations which are frequently challenging to fulfill due to the complexity and sensitivity of their nature. At the forefront of myriad duties is the specific duty to properly educate and advise those at the apex of the corporate pyramid—its directors—of their own duties under all applicable law. This Article has attempted to alleviate this particular burden in multiple ways. First, by pulling together and fleshing out relevant rules and precedent in order to help define this duty regarding director education. Second, by surveying the practices of in-house counsel departments at Fortune 1000 companies to help identify prevailing approaches. And finally, by attempting to distill all of the above into a package of best practices. Or, better yet, a proffered package of best practices that others will consider, critique, and correct, ultimately rendering an even more clearly articulated set of standards regarding the duties of general counsel to educate and advise corporate directors.
APPENDIX A – SURVEY

Thank you for your interest in this survey. It should only take 3-5 minutes of your time.

The survey’s subject matter is director training, with a focus on the role played by in-house counsel.

Responses are completely anonymous.

At the end of the survey there are instructions for requesting a free copy (electronic or paper) of the survey results when they are published.

This project has been approved under the Exempt Review procedures of Hofstra University’s Institutional Review Board governing the use of humans as research subjects. It has been supported by the University’s Special Leave policy.

Please do not hesitate to contact me at ronald.colombo@hofstra.edu (or via phone at 516-463-5931) should you have any questions are concerns.

INSTRUCTIONS

1. Please select the most accurate answer choice from the ones provided in answering each question. To the extent necessary, an answer choice of “other,” with a box for entering an explanation, is provided. “Do not know” is also provided as a choice.

2. Questions cannot be skipped.

3. Most questions permit the selection of only one answer. Some questions permit you to choose multiple answers. These are flagged via the parenthetical: “(select all that apply).”

4. The survey’s last question is simply a free-form text box for you to use to provide any other information or feedback you wish to. (This question can be skipped.)

5. Please complete the survey in one sitting.

Thank you!
Q1: Who has completed this survey?
- general counsel
- attorney in general counsel’s office other than general counsel
- non-attorney in general counsel’s office
- other attorney
- other non-attorney

Q2: Are new directors to your company provided with formal training regarding their fiduciary duties under corporate law (the duties of care and loyalty)?
- yes
- no

Skip To: Q5 If Are new directors to your company provided with formal training regarding their fiduciary duties... = no
Q3: Who primarily provides new directors with formal training regarding their fiduciary duties?

- the general counsel’s office
- the board of directors (or a committee thereof)
- the compliance department (or equivalent)
- the human resources department (or equivalent)
- outside counsel
- director training is primarily outsourced (to a person/entity other than outside counsel)
- other ________________________________
- do not know

Q4: What are the components of the formal training of directors regarding their fiduciary duties (select all that apply)?

- live, in-person presentation(s)
- webinars
- distribution of hard-copy materials and/or manuals
- distribution of electronic-copy materials and/or manuals
- online coursework
- other ________________________________
- do not know

Display This Question:

If Are new directors to your company provided with formal training regarding their fiduciary duties... = no
Q5: If new directors are not provided with formal training, how are new directors expected to know and understand their fiduciary duties (select all that apply)?

☐ through past experience and qualifications
☐ through ongoing, formal continuing education efforts
☐ through self study
☐ other __________________________
☐ do not know

Q6: Apart from any potential initial training, do directors receive ongoing or periodic formal training regarding their fiduciary duties?

○ yes
○ no

Skip To: Q10 If Apart from any potential initial training, do directors receive ongoing or periodic formal training... = no

Q7: What is the form of the ongoing or periodic formal training that directors receive regarding their fiduciary duties?

☐ live, in-person presentation(s)
☐ webinars
☐ distribution of hard-copy materials and/or manuals
☐ distribution of electronic-copy materials and/or manuals
☐ online coursework
☐ other __________________________
☐ do not know
Q8: Who primarily provides new directors with formal training regarding their fiduciary duties?

- the general counsel’s office
- the board of directors (or a committee thereof)
- the compliance department (or equivalent)
- the human resources department (or equivalent)
- outside counsel
- director training is primarily outsourced (to a person/entity other than outside counsel)
- other ________________________________
- do not know

Q9: How often do directors receive ongoing or periodic training regarding their fiduciary duties (select best answer)?

- regularly scheduled training, more than once per year
- regularly scheduled training, approximately once per year
- regularly scheduled training, less frequently than once per year
- only when necessary due to changes in law/regulation
- only when necessary due to the occurrence of particular corporate matters or undertakings
- only when requested by the board
- other ________________________________
- do not know

Display This Question:

If Apart from any potential initial training, do directors receive ongoing or periodic formal training... = no
Q10: If directors are not provided with ongoing or periodic training regarding their fiduciary duties, how are directors expected to know and understand their fiduciary duties (select all that apply)?

☐ directors are expected to know and understand their fiduciary duties based upon their past experience, qualifications, and self-study

☐ through an initial orientation and training upon joining the board

☐ directors receive legal advice regarding their fiduciary duties on a case-by-case basis, as becomes necessary with regard to particular corporate matters or undertakings

☐ such duties are explained whenever a director (or the board) requests an explanation

☐ other __________________________________________________

☐ do not know

Q11: What is the status of your general counsel?

☐ a director and an officer of the corporation

☐ a director but not an officer of the corporation

☐ an officer but not a director of the corporation

☐ neither a director nor an officer of the corporation

☐ not associated with the corporation: general counsel is retained from an outside firm

☐ other __________________________________________________

☐ do not know

Display This Question:

If What is the status of your general counsel? != a director and an officer of the corporation

And What is the status of your general counsel? != a director but not an officer of the corporation
Q12: Is the company’s general counsel required to regularly attend meetings of the board of directors?

- yes
- no
- do not know

Display This Question:

If What is the status of your general counsel? != a director and an officer of the corporation
And What is the status of your general counsel? != a director but not an officer of the corporation
And Is the company's general counsel required to regularly attend meetings of the board of directors? != yes

Q13: How frequently does the corporation's general counsel attend meetings of the board of directors?

- general counsel attends most board meetings
- general counsel attends between 10% and 50% of board meetings
- general counsel attends less than 10% of board meetings
- other ____________________________
- do not know

Q14: Does the corporation’s general counsel meet with independent directors of the board apart from his/her meetings with the board generally?

- no
- yes, and such meetings occur pursuant to a regular schedule
- yes, but only upon request
- other ____________________________
- do not know

Q15: Is there anything else you would like to share with regard to director orientation and training, either at your corporation or regarding practices elsewhere?
APPENDIX B – SURVEY DATA REPORT

Q1 - Who has completed this survey?

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Who has completed this survey?</td>
<td>1.00</td>
<td>5.00</td>
<td>1.24</td>
<td>0.67</td>
<td>0.45</td>
<td>45</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>general counsel</td>
<td>82.22%</td>
<td>37</td>
</tr>
<tr>
<td>2</td>
<td>attorney in general counsel’s office other than general counsel</td>
<td>15.56%</td>
<td>7</td>
</tr>
<tr>
<td>3</td>
<td>non-attorney in general counsel’s office</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>other attorney</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>5</td>
<td>other non-attorney</td>
<td>2.22%</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>100%</strong></td>
<td><strong>45</strong></td>
</tr>
</tbody>
</table>
Q2 - Are new directors to your company provided with formal training regarding their fiduciary duties under corporate law (the duties of care and loyalty)?

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Are new directors to your company provided with formal training regarding their fiduciary duties under corporate law (the duties of care and loyalty)?</td>
<td>1.00</td>
<td>2.00</td>
<td>1.29</td>
<td>0.45</td>
<td>0.21</td>
<td>41</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>yes</td>
<td>70.73%</td>
<td>29</td>
</tr>
<tr>
<td>2</td>
<td>no</td>
<td>29.27%</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td></td>
<td>41</td>
</tr>
</tbody>
</table>
### Q3 - Who primarily provides new directors with formal training regarding their fiduciary duties?

#### Field

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Who primarily provides new directors with formal training regarding their fiduciary duties?</td>
<td>1.00</td>
<td>7.00</td>
<td>2.21</td>
<td>2.16</td>
<td>4.67</td>
<td>28</td>
</tr>
</tbody>
</table>

#### Answer

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>the general counsel’s office</td>
<td>75.00%</td>
<td>21</td>
</tr>
<tr>
<td>2</td>
<td>the board of directors (or a committee thereof)</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>3</td>
<td>the compliance department (or equivalent)</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>the human resources department (or equivalent)</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>5</td>
<td>outside counsel</td>
<td>14.29%</td>
<td>4</td>
</tr>
<tr>
<td>6</td>
<td>director training is primarily outsourced (to a person/entity other than outside counsel)</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>7</td>
<td>other</td>
<td>10.71%</td>
<td>3</td>
</tr>
<tr>
<td>8</td>
<td>do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>100%</td>
<td>28</td>
</tr>
</tbody>
</table>

**Q3_7 TEXT - other**

New Directors meet with our CEO and then each of our senior management team to learn about their area of responsibility.

**Corporate Secretary’s Office**

The general counsel and company secretary provide the training.
Q4 - What are the components of the formal training of directors regarding their fiduciary duties (select all that apply)?

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>live, in-person presentation(s)</td>
<td>40.30%</td>
<td>27</td>
</tr>
<tr>
<td>2</td>
<td>webinars</td>
<td>2.99%</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td>distribution of hard-copy materials and/or manuals</td>
<td>26.87%</td>
<td>18</td>
</tr>
<tr>
<td>4</td>
<td>distribution of electronic-copy materials and/or manuals</td>
<td>25.37%</td>
<td>17</td>
</tr>
<tr>
<td>5</td>
<td>online coursework</td>
<td>1.49%</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
<td>other</td>
<td>2.99%</td>
<td>2</td>
</tr>
<tr>
<td>7</td>
<td>do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td>100%</td>
<td>67</td>
</tr>
</tbody>
</table>

Q4_6 TEXT - other

Video conference

Part of onboarding meeting with legal department
Q5 - If new directors are not provided with formal training, how are new directors expected to know and understand their fiduciary duties (select all that apply)?

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>through past experience and qualifications</td>
<td>32.26%</td>
<td>10</td>
</tr>
<tr>
<td>2</td>
<td>through ongoing, formal continuing education efforts</td>
<td>32.26%</td>
<td>10</td>
</tr>
<tr>
<td>3</td>
<td>through self-study</td>
<td>22.58%</td>
<td>7</td>
</tr>
<tr>
<td>4</td>
<td>other</td>
<td>12.90%</td>
<td>4</td>
</tr>
<tr>
<td>5</td>
<td>do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>100%</strong></td>
<td><strong>31</strong></td>
</tr>
</tbody>
</table>

Q5_4_TEXT - other

Informal discussion

- ad-hoc education when it matters for critical Board decisions
- Informal but periodic training at Board meetings - not geared just for new directors but as a refresher to all
- Discussion with CLO
Q6 - Apart from any potential initial training, do directors receive ongoing or periodic formal training regarding their fiduciary duties?

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Apart from any potential initial training, do directors receive ongoing or periodic formal training regarding their fiduciary duties?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1.00</td>
<td>2.00</td>
<td>1.25</td>
<td>0.43</td>
<td>0.19</td>
<td>40</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>yes</td>
<td>75.00%</td>
<td>30</td>
</tr>
<tr>
<td>2</td>
<td>no</td>
<td>25.00%</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>40</td>
<td></td>
</tr>
</tbody>
</table>
Q7 - What is the form of the ongoing or periodic formal training that directors receive regarding their fiduciary duties?

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>live, in-person presentation(s)</td>
<td>40.00%</td>
<td>28</td>
</tr>
<tr>
<td>2</td>
<td>webinars</td>
<td>8.57%</td>
<td>6</td>
</tr>
<tr>
<td>3</td>
<td>distribution of hard-copy materials and/or manuals</td>
<td>18.57%</td>
<td>13</td>
</tr>
<tr>
<td>4</td>
<td>distribution of electronic-copy materials and/or manuals</td>
<td>24.29%</td>
<td>17</td>
</tr>
<tr>
<td>5</td>
<td>online coursework</td>
<td>2.86%</td>
<td>2</td>
</tr>
<tr>
<td>6</td>
<td>other</td>
<td>5.71%</td>
<td>4</td>
</tr>
<tr>
<td>7</td>
<td>do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>100%</strong></td>
<td><strong>70</strong></td>
</tr>
</tbody>
</table>

Q7_6_TEXT - other

- video conference
- seminars
- Informal training
- Access to NACD and other resources on demand
Q8 - Who primarily provides new directors with formal training regarding their fiduciary duties?

- **the general counsel’s office**: 66.67% (20)
- **the board of directors (or a committee thereof)**: 0.00% (0)
- **the compliance department (or equivalent)**: 0.00% (0)
- **the human resources department (or equivalent)**: 0.00% (0)
- **outside counsel**: 30.00% (9)
- **director training is primarily outsourced (to a person/entity other than outside counsel)**: 0.00% (0)
- **other**: 3.33% (1)
- **do not know**: 0.00% (0)

**Total**: 100% (30)

Q8_7_TEXT - other
The General Counsel, the company Secretary and outside counsel.
Q9 - How often do directors receive ongoing or periodic training regarding their fiduciary duties (select best answer)?

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>How often do directors receive ongoing or periodic training regarding their fiduciary duties (select best answer)?</td>
<td>1.00</td>
<td>7.00</td>
<td>3.57</td>
<td>1.73</td>
<td>2.98</td>
<td>30</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>regularly scheduled training, more than once per year</td>
<td>10.00%</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>regularly scheduled training, approximately once per year</td>
<td>26.67%</td>
<td>8</td>
</tr>
<tr>
<td>3</td>
<td>regularly scheduled training, less frequently than once per year</td>
<td>16.67%</td>
<td>5</td>
</tr>
<tr>
<td>4</td>
<td>only when necessary due to changes in law/regulation</td>
<td>6.67%</td>
<td>2</td>
</tr>
<tr>
<td>5</td>
<td>only when necessary due to the occurrence of particular corporate matters or undertakings</td>
<td>30.00%</td>
<td>9</td>
</tr>
<tr>
<td>6</td>
<td>only when requested by the board</td>
<td>3.33%</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>other</td>
<td>6.67%</td>
<td>2</td>
</tr>
<tr>
<td>8</td>
<td>do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>100%</td>
<td>30</td>
</tr>
</tbody>
</table>

Q9_7_TEXT - other
Annually and additionally as necessary
periodic - varies as to time
Q10 - If directors are not provided with ongoing or periodic training regarding their fiduciary duties, how are directors expected to know and understand their fiduciary duties (select all that apply)?

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>directors are expected to know and understand their fiduciary duties based upon their past experience, qualifications, and self-study</td>
<td>37.04%</td>
<td>10</td>
</tr>
<tr>
<td>2</td>
<td>through an initial orientation and training upon joining the board</td>
<td>14.81%</td>
<td>4</td>
</tr>
<tr>
<td>3</td>
<td>directors receive legal advice regarding their fiduciary duties on a case-by-case basis, as becomes necessary with regard to particular corporate matters or undertakings</td>
<td>25.93%</td>
<td>7</td>
</tr>
<tr>
<td>4</td>
<td>such duties are explained whenever a director (or the board) requests an explanation</td>
<td>22.22%</td>
<td>6</td>
</tr>
<tr>
<td>5</td>
<td>other</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>6</td>
<td>do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td><strong>100%</strong></td>
<td><strong>27</strong></td>
</tr>
</tbody>
</table>
Q11 - What is the status of your general counsel?

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>What is the status of your general counsel? - Selected Choice</td>
<td>1.00</td>
<td>7.00</td>
<td>3.08</td>
<td>0.72</td>
<td>0.52</td>
<td>40</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>a director and an officer of the corporation</td>
<td>2.50%</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>a director but not an officer of the corporation</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>3</td>
<td>an officer but not a director of the corporation</td>
<td>92.50%</td>
<td>37</td>
</tr>
<tr>
<td>4</td>
<td>not associated with the corporation: general counsel is retained from an outside firm</td>
<td>2.50%</td>
<td>1</td>
</tr>
<tr>
<td>5</td>
<td>other</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>6</td>
<td>do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td>7</td>
<td>neither a director nor an officer of the corporation</td>
<td>2.50%</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>100%</strong></td>
<td><strong>40</strong></td>
</tr>
</tbody>
</table>
Q12 - Is the company’s general counsel required to regularly attend meetings of the board of directors?

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Is the company’s general counsel required to regularly attend meetings of the board of directors?</td>
<td>1.00</td>
<td>7.00</td>
<td>1.28</td>
<td>0.99</td>
<td>0.97</td>
<td>39</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>yes</td>
<td>84.62%</td>
<td>33</td>
</tr>
<tr>
<td>2</td>
<td>no</td>
<td>12.82%</td>
<td>5</td>
</tr>
<tr>
<td>7</td>
<td>do not know</td>
<td>2.56%</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>100%</td>
<td>39</td>
</tr>
</tbody>
</table>
Q13 - How frequently does the corporation’s general counsel attend meetings of the board of directors?

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>How frequently does the corporation’s general counsel attend meetings of the board of directors? - Selected Choice</td>
<td>2.00</td>
<td>6.00</td>
<td>3.67</td>
<td>1.49</td>
<td>2.22</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>general counsel attends most board meetings</td>
<td>33.33%</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td>general counsel attends between 10% and 50% of board meetings</td>
<td>16.67%</td>
<td>1</td>
</tr>
<tr>
<td>4</td>
<td>general counsel attends less than 10% of board meetings</td>
<td>16.67%</td>
<td>1</td>
</tr>
<tr>
<td>5</td>
<td>other</td>
<td>16.67%</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
<td>do not know</td>
<td>16.67%</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>100%</td>
<td>6</td>
</tr>
</tbody>
</table>
Q14 - Does the corporation’s general counsel meet with independent directors of the board apart from his/her meetings with the board generally?

<table>
<thead>
<tr>
<th>#</th>
<th>Field</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std Deviation</th>
<th>Variance</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Does the corporation’s general counsel meet with independent directors of the board apart from his/her meetings with the board generally?</td>
<td>1.00</td>
<td>4.00</td>
<td>2.58</td>
<td>0.80</td>
<td>0.64</td>
<td>40</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>#</th>
<th>Answer</th>
<th>%</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>no</td>
<td>12.50%</td>
<td>5</td>
</tr>
<tr>
<td>2</td>
<td>yes, and such meetings occur pursuant to a regular schedule</td>
<td>25.00%</td>
<td>10</td>
</tr>
<tr>
<td>3</td>
<td>yes, but only upon request</td>
<td>55.00%</td>
<td>22</td>
</tr>
<tr>
<td>4</td>
<td>other</td>
<td>7.50%</td>
<td>3</td>
</tr>
<tr>
<td>5</td>
<td>do not know</td>
<td>0.00%</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>100%</td>
<td>40</td>
</tr>
</tbody>
</table>

Q14_4_TEXT - other
yes-as necessary
Yes, as needed or requested
N/A
Q15 - Is there anything else you would like to share with regard to director orientation and training, either at your corporation or regarding practices elsewhere?

No

Directors are able to request training or classes through third party organizations.

N/A

No

We also use NACD training for new directors, particularly those who have not previously served on public boards.

The GC is litigation focused and not a corporate law expert. Corporate law advice is provided by outside counsel.