

**IN-HOUSE INSIGHTS:
COUNSEL'S CHALLENGES, CHOICES, CONFLICTS, CULTURE**

1) THE MULTI-DIMENSIONAL ROLES OF THE IN-HOUSE COUNSEL.

A 2018 Deloitte study, entitled *The Four Faces of the Chief Legal Officer*,¹ provides one of the most insightful and perceptive treatments of the multi-faceted responsibilities of the Chief Legal Officer (CLO) or General Counsel (GC) position (collectively, CLO / GC) in recent memory. The main thesis is that a CLO / GC must fulfill four roles to be truly successful: Strategist, Catalyst, Guardian, and Operator. This multi-dimensional approach is required of in-house legal departments in general, and not just the CLO / GC. Here is a more detailed description of each of the four dimensions mentioned in the Deloitte study:

- a) Strategist: A strategist brings clear legal strategy that supports and enables business strategy. In this CLO / GC role, you provide the senior executive team with legal guidance that enables them to achieve growth objectives. This requires the following:
 - i) Building strong relationships with leadership teams
 - ii) Building strong relationships with board members
 - iii) Understanding the strategy and value creation levers for the business and reflect them in your legal strategy.
 - iv) Serving as a trusted business advisor who proactively engages management and the board around strategic business issues.
 - v) Anticipating and proactively developing a strategy to address changes in regulatory requirements and public policy.
- b) Catalyst: A catalyst enables competitive advantage by bringing a legal lens and the critical guidance needed to facilitate the executive leadership team's ability to select the right path forward and set the tone at the top for the business. Some responsibilities that may be associated with the catalyst role:
 - i) Assessing whether business is carried out in the right way; develop the corporate risk profile and a strong company-wide compliance framework.
 - ii) Empowering the legal team to serve as trusted business advisors who are sought out to proactively help the business develop solutions.
 - iii) Taking the lead in building a strong corporate culture that is aligned with the company's values around compliance and integrity.
 - iv) Challenging the status quo as a change agent
 - v) Driving client satisfaction and experience, with legal as a value-added service
- c) Guardian: In guardian mode, you are expected to guide legal and regulatory matters for the business, navigating complexity while mitigating risk. This is the foundational responsibility for the chief legal officer role and in-house legal team. Some responsibilities that may be associated with the guardian role:

¹ <https://www2.deloitte.com/us/en/pages/finance/articles/gx-cfo-role-responsibilities-organization-steward-operator-catalyst-strategist.html>

- i) Guarding corporate integrity and embodying tone at the top within the legal department.
 - ii) Understanding business and compliance risk
 - iii) Maintaining clarity between the role of the board and management
 - iv) Identifying and remediating exposure to brand and reputation risk
 - v) Managing governance approach on regulatory and legal issues
- d) Operator: As an operator, you spend much of your time focusing on how to build a strong legal operations function, optimizing the capabilities, talent, service levels, costs, and legal structure required to best serve your business partners. Some responsibilities that may be associated with the operator role:
- i) Creating leadership development and succession plans for the legal function, including the top legal officer role.
 - ii) Developing and implementing key performance metrics for the legal organization and its outside counsel
 - iii) Identifying skill and subject matter expertise gaps, and developing plans to fill them, identifying and implementing technology solutions for the legal department.
 - iv) Refining the legal operations model to increase effectiveness of legal services.
 - v) Developing accurate forecasting and reporting of legal spend

Interesting Note: Deloitte's research suggests that most CEOs and boards want new CLO / GC's to spend about 60–70 percent of their time in the catalyst and strategist categories, with the remaining 30–40 percent in the guardian and operator categories. However, based on Deloitte's conversations with new CLO / GC's, their time allocation is often reversed.

e) Questions for Discussion:

- How have you been required to serve in these different roles in your role as in-house counsel?
- Which of these roles have you spent most of your time focusing on at your organization?
- Which role would you like to spend more time on or improve in performing?

2) CONFLICT OF INTEREST CONCERNS ARISING FROM SERVING BOTH BOARD AND MANAGEMENT.

- a) Inherent Tension. Many of the common challenges of a ministry in-house counsel, especially the CLO / GC, comes from the fact that the CLO / GC represents the entire organization and the entire leadership of that organization, instead of just a specific constituency such as the Senior Management or the Board of Directors. That means balancing the demands and expectations of the Board and Management (especially the President/CEO) when you serve as CLO / GC. Among the questions that we often encounter:

- How does the CLO / GC provide proper representation of the organization when there are problems with the President/CEO's performance?
 - How does the CLO /GC represent all constituents of the organization when he/she engages in an internal investigation that may expose deficiencies in the Board or management?
- b) Applicable Ethics Rules. The following two Ethics Rules are the ones most relevant to determining how to navigate the tension in representing an organization when the Board of Directors and the Senior Management may have different, perhaps even competing interests:

Rule 1.7 - Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or by the personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

Rule 1.6 - Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation ...

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

- c) Does Representing Both Board and Management Create A Conflict of Interest? An in-house counsel serves as the legal counsel of the *entire* organization. There can be no direct adversity conflict when a lawyer represents one client: the organization, and not individuals within the organization. At the same time, while the organization is the client, the organization is acting principally through the Board of Directors. There could only be a conflict of interest if the CLO / GC, or for that matter, any corporate counsel, were to intentionally undertake separate legal representation of a corporate constituent, such as an individual officer or the entire management team. In that case, it is conceivable that “the representation of one client [would] be directly adverse to another client” and that “there [could be] a significant risk that the representation of one or more clients [would] be materially limited by the lawyer’s responsibilities to another client.” (Rule 1.7)

American Bar Association Special Report (Vol. 29 No. 20) (the “ABA Special Report”),² entitled “Client Identity,” addresses corporate counsel representation, and specifically delved into the challenges of officers, directors, and other “constituents” mistaking the corporate counsel as their own counsel.

In the section called “Many Executives Don’t Get It,” the ABA Special Report states that despite the tendency for executives to infer that the General Counsel represents them, or should represent them, the General Counsel must hold to the representation of the entity itself.

As the ABA Special Report notes, “The typical problem arises when officers or directors ask corporate counsel for advice or information about how a particular transaction will affect them. Unless the lawyer embarked on an individual attorney-client relationship with the constituent, the advice is generally regarded as being for the corporate client’s benefit and the attorney is held not to have assumed a duty to the individual.”

When the constituent consults a corporate counsel to carry out his/her responsibilities for the corporation, it is not reasonable for the constituent to think that the corporate counsel represents him or her. Lest there should be any confusion, if there is an “obvious and substantial conflict of interest” between the constituent and the organization (for example, if their interests are adversarial given the facts and circumstances), it weighs against a finding that the corporate counsel represents the constituent, too. In such an instance, no conflict of interest actually exists because the corporate counsel only represents the organization.

² See Appendix of CLE Outline for ABS Special Report (Vol. 29, No. 20).

Moreover, a corporate counsel does not become the counsel for the constituent just because he receives confidential information from the constituent on a matter of interest to the organization.

d) No Conflict of Interest Arises even when the CLO / GC Represents the Organization Against Constituents.

In the section called “Lawyers Usually Are Permitted to Represent Corporate Clients in Actions by or Against Constituents,” the same ABA Special Report goes even further to assert that it is permissible for the CLO / GC or any corporate counsel to represent the organization in (1) legal actions by the organization against one or more constituents, or (2) legal actions brought by one or more constituents against the organization. That is because corporate counsel only represents the organization as his/her client, there is no conflict of interest in an adversarial proceeding between the organization and its constituents.

e) Does Withholding Confidential Information From Certain Corporate Constituents or Divulging Information from Corporate Constituents Constitute A Conflict of Interest or Breach of Confidentiality?

Under Rule 1.6, information relating to the representation of the organization is confidential. Therefore, in the context of a confidential investigation such as a whistleblower investigation, if the CLO / GC learns of any information from that investigation, he would be prohibited from disclosing that information to constituents of the organization. Consequently, it is not a conflict of interest for the CLO / GC, or any corporate counsel, to withhold information in connection with a whistleblower investigation from the Senior Management or any other individual constituents. The only exception is if the organization (presumably, through the Board of Directors) provides explicit or implicit authorization for a corporate counsel to disclose to such information to a constituent.

Conversely, as the ABA Special Report notes, because the CLO / GC represents the organization, a constituent should understand that any information that the constituent tells the CLO / GC, including information that might be adverse to the constituent, could be shared, or will be shared, with the CLO / GC’s client, the organization. Practically speaking, that may mean that a constituent should be guarded about what he or she discloses to the CLO / GC, since that could be used against the constituent in a legal action brought by the organization against the constituent or by the constituent against the organization. But as the preceding section in this outline confirms, there is no conflict of interest arising from this inherent tension because the CLO / GC has only one client: the organization itself.

f) Corporations with Legal Counsel Representing Different Constituents. From research, there appear to be some corporations with two CLO / GC’s, in which one CLO / GC serves in a different field of practice or different geographic region than the other CLO /

GC. For example, in some corporations, one CLO / GC covers transactional work while the other CLO / GC covers litigation. In several other examples, one CLO / GC covers a different geographic market than the other CLO / GC. Thus far, research has not uncovered any examples of one CLO / GC (or corporate counsel) representing the Board of Directors with another CLO / GC (or corporate counsel) representing Senior Management. This is likely because having such a structure might foster a competitive, adversarial relationship between the Board and Senior Management, since per the Ethics Rules, their respective lawyers would be zealously advocating for each of them, and it would create adversity of representation and a conflict of interest for the Legal Department in that corporation.

- g) Conclusion: There is no conflict of interest or breach of confidentiality in the General Counsel's representation of both the Board of Directors and Senior Management as part of his/her overall representation of the entire organization.
- h) Question for Discussion: How do you balance the demands and expectations of serving both the Board and the Senior Management when you serve the organization as your client? What tensions and problems have arisen in your experience? What are some proactive steps you can take to reduce tension and facilitate collaboration?

3) SAFEGUARDING ATTORNEY-CLIENT PRIVILEGE AS ONE OF THE ORGANIZATION'S MOST TRUSTED RESOURCES.

- a) Perhaps the most critical key to success as an in-house counsel to have the trust of colleagues, so that, among other things, they will increasingly rely on your advice and include you early in the process of developing business plans so you can recommend proactive measures to address legal and reputational risks. It also helps for other staff to share concerns about the work culture so you can help foster a healthier environment, which reduces the likelihood of work-related claims. However, gaining the trust of other colleagues means that others will expect you to keep their confidences, even if their communications are not privileged under the rules of ethics. It is essential, therefore, to remind yourself and educate others about the proper application and limitations of the attorney-client privilege.
- b) Definition. The attorney-client privilege protects communications between a client and an attorney when the communication was made for the purpose of the client obtaining legal advice.³
- c) Intent. The intent of the privilege is "to encourage full and frank communication between attorneys and their clients ... [recognizing] that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."⁴ It is a pro-hoc protection measure used to protect against production of sensitive documents during discovery related to adversarial proceedings.

³ See e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

⁴ *Id.* at 389.

On the one hand, discovery is often applied broadly so parties can unearth information relevant to the subject of dispute; on the other hand, parties assert the privilege to render certain communications undiscoverable. Practically speaking, in order to assert the privilege in response to a discovery request by the adversarial party, the client's attorney will produce a list of documents that they consider protected by the privilege (a "privilege log"). The adversarial party can challenge the assertion of privilege and demand discovery. If the court agrees with the adversarial party, the judge could conduct an in-camera review of the purportedly privileged documents and render a decision on their discoverability.

- d) Multinational and multistate complications. Different countries, and even within the U.S., the federal courts, and state and local jurisdictions, may have different rules pertaining to the attorney-client privilege, which makes it even more imperative for in-house counsel in multistate and multinational corporations to be careful about the requirements for preserving the privilege.
- e) General Requirements for privilege to apply to communication:⁵
 - i) Communication must be between privileged persons; *i.e.*, client and attorney or agent of attorney (e.g., investigator, analyst, expert)
 - ii) Applies principally to communication from client and contain confidential information; also extends to responsive communication from attorney.
 - iii) Communication occurs outside presence of nonprivileged third party;
 - iv) Communication is for purpose of securing legal advice;
 - v) Privilege has not otherwise been waived.
- f) Comparison to Work Product Doctrine. The work product doctrine, also known as the attorney-work product privilege, is a common law doctrine that protects documents and tangible items prepared by an attorney or party in anticipation of litigation or trial. The doctrine's purpose is to protect an attorney's mental impressions, conclusions, opinions, and legal theories, and to prevent adversaries from exploiting their work.

The work product doctrine is broader than the attorney-client privilege because it protects more than just confidential matters and communications. However, it's also narrower because it only protects materials prepared specifically for litigation. The doctrine can also include materials prepared by people other than the attorney, as long as they were created for the same purpose.

To obtain work product, a party must demonstrate that the material is necessary to prepare their case, and that they can't get a similar material by other means without undue hardship. Whether a document was prepared in anticipation of litigation is a question of fact that's governed by federal law.

- g) Inapplicability of Privilege. The privilege does not apply to the following:

⁵ United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. AFL-CIO, 119 F.3d 210, 214 (2d. Cir. 1997); In re Grand Jury Investigation, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992).

- i) Underlying facts.
 - ii) Client communications that do not involve a lawyer or a nonlawyer acting as agent for lawyer.
 - iii) Mere inclusion of an attorney as a recipient on a communication that is not primarily seeking legal advice or addresses business or other non-legal issues.
 - iv) Concealing or facilitating crime or fraud.⁶
- h) In-House Privilege and Complications.
- i) The client is not one person, but the corporate entity with numerous employees and volunteers (e.g., Board members) advancing the interest of the corporation, and sometimes, to be candid, their own interests within the organization. That makes it difficult to determine when the privilege applies. But the attorney's legal advice should be for the corporation as a whole.
 - ii) The dual role of in-house counsel as trusted legal advisor and a business advisor makes it challenging to distinguish what is protected (the legal advice) and what is not protected (the business advice).
 - iii) In general, it is more likely for the privilege to apply if the person communicating is an officer of the corporation than if he/she is a lower-level employee.
 - iv) In general, it is more likely for the privilege to apply if the subject matter involves legal issues directly affecting the corporation than if the subject matter involves business issues or a business decision.
- i) Waivers of Privilege.
- i) Express waiver: client or attorney discloses protected information to third party.⁷
 - ii) Inadvertent waiver: unintentional or accidental disclosure of protected information to third party.⁸
 - iii) Implied waiver: party asserting the attorney-client privilege places the protected information at issue such as in litigation.⁹
- j) Best Practices.

⁶ United States v. Zolin, 491 U.S. 554 (1989); Diamond v. Stratton, 95 F.R.D. 503 (S.D.N.Y. 1982).

⁷ United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991) (disclosure of privileged information to the government constituted an express waiver, thus allowing the government to compel further disclosures related to the same subject matter).

⁸ In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) (establishing a multi-factor test to determine whether inadvertent disclosure constitutes a waiver, emphasizing the reasonableness of precautions taken and the promptness of remedial measures). Generally, the courts have been meticulous in scrutinizing inadvertent disclosures, balancing fairness and the integrity of the attorney-client privilege.

⁹ Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (by asserting a claim that required the disclosure of privileged communications, a party impliedly waived the privilege as to those communications relevant to the claim).

- i) Precise communications focusing on legal issues.
- ii) Avoiding conclusory statements about legal issues.
- iii) Avoid over-use of “privileged” legend.
- iv) Avoid overly broad circulation of privileged documents.

k) Question for Discussion:

- i) What are common challenges you have experienced in dealing with expectations of confidentiality and/or privilege in communications with other staff in your organization?
- ii) What are ways that you could help the following better understand confidentiality and privilege? Your Board members? Your CEO? Your other C-suite executives? Your HR leader? Your lower-level staff?

4) EMPLOYEE CONCERNS AND CORPORATE CULTURE. In-house counsel play a unique role in pro-actively addressing employee concerns and toxic culture issues to promote a healthy corporate culture and eliminate or minimize the risk of employee claims against the organization. At the same time, they are expected to respond promptly to and defend the organization from employee claims.

- a) The Organization is the Client. Just as with senior executives and Board members, in-house counsel must clearly communicate to other employees that his/her client is the organization, and not individual employees.¹⁰ This makes it particularly challenging if the CLO / GC also leads the organization’s Human Resources (HR) department since employees often look to HR to be their advocate in areas of concern. However, even if the CLO / GC serves in such a dual role, he/she could find a way to fulfill both roles ethically and responsibly if he/she is viewing their HR function as a way to eliminate or minimize liability risk. If an employee has a legitimate complaint against a supervisor or is blowing the whistle on financial improprieties, then it behooves the CLO / GC to investigate and determine if any such complaint is valid; and if it proves to be true, then he/she can certainly take remedial action, as that will protect the organization from civil or criminal action.
- b) Balancing the in-house counsel’s concern for employment law/HR issues is the reality that regulatory and business demands expand the need for CLO / GC influence on the culture of the organization.
 - i) In 1991, the US government issued the United States Sentencing Guidelines for Organizations, which incentivized the creation of corporate compliance programs meant to prevent and detect violations of the law. This began a more systematic approach by companies to address regulatory compliance as well as ethics within their organizations. Ultimate responsibility for a company's regulatory compliance usually rests with its CLO / GC, and as regulatory scrutiny has increased, so has companies' need for regulatory compliance advice. Although some companies have compliance functions that are separate from the legal department, many of the

¹⁰ See ABS Special Report (Vol. 29, No. 20).

activities mandated by a compliance program require legal analysis, and any effective compliance program requires coordination with the general counsel.

- ii) The emphasis on the CLO / GC's role in ethics and compliance has made the position grow in professional stature and influence. Regulators recognize that in-house counsel have an essential role in promoting compliance and ethics in their companies. They have even included in-house counsel in regulatory regimes meant to deter corporate wrongdoing like the Sarbanes-Oxley Act of 2002. Both directors and general counsel are acutely aware of the importance of the CLO / GC's role in promoting ethics and compliance within the company. In the Association of Corporate Counsel (ACC)'s *Skills for the 21st Century General Counsel* survey, 54 percent of directors ranked "ensuring a company's compliance with relevant regulations" as one of the top three ways general counsel provide value to the company. ACC's 2017 Chief Legal Officer Survey found that 74 percent of general counsel rated ethics and compliance as "extremely" or "very" important over the next 12 months - the highest ranked concern in the survey. This emphasis on the CLO / GC's role in ethics and compliance created the need for CLO / GC to exert greater influence within their companies in order to fulfill the compliance mandate from regulators and the Board.
- iii) Even outside of compliance concerns, legal and regulatory issues are increasingly central to the implementation of sophisticated business strategies. For example, protecting innovation requires understanding intellectual property law; overseas expansion requires knowing the employment laws of other countries; advances in data analytics require knowledge of data privacy laws. Where outside counsel used to be the primary legal advisers to the CEO, the CLO / GC has come to fill that role in every corporation, particularly the large multinational and/or publicly held company. As legal departments have evolved and attracted top-level talent below the general counsel, the general counsel has carved out more time to consider strategic business issues and contribute to setting strategies. This development is a positive contribution to corporate culture.
- iv) When the CLO / GC is part of the executive leadership that makes strategic business and operational decisions, those decisions are informed by not only a legal perspective, but also by broad ethical and public policy considerations. The CLO / GC is a diverse and unique voice at the executive table. ACC's *Skills for the 21st Century General Counsel* survey suggests that Boards are just beginning to perceive the value of the general counsel as a strategic advisor. Twenty-seven percent of the directors surveyed ranked the general counsel's "input into strategic business decisions" as a top-three value driver currently, with 37 percent anticipating it would be a top-three value driver in the future.
- v) Food for Thought: A strong CLO / GC supports a strong corporate culture. As Robert F. Kennedy once stated: "Courage is the most important attribute of a lawyer. It is more important than competence or vision. It can never be an elective in any law

school. It can never be de-limited, dated or outworn.” Robert F. Kennedy, Speech at University of San Francisco Law School, San Francisco, 29 Sept. 1962

Of the 12 companies that have made Ethisphere's list of the "World's Most Ethical Companies" each year it has been published,⁴ ACC found that the majority of them have CLO / GC who are well-positioned to influence corporate culture. For example, in 91 percent of those companies, the CLO / GC reports to the CEO. In 83 percent, the CLO / GC serves as the Corporate Secretary, indicating direct access to the Board, and in 83 percent of those companies, the CLO / GC is also responsible for compliance.

The preventative role of the CLO / GC and corporate legal department is key to their contribution to regulatory compliance and corporate culture. When the general counsel is included in discussions of business strategies before they are implemented, she can help the company assess and avoid legal and business risks. As preventing violations of laws and regulations is preferable to mere detection of violations when they occur, the CLO / GC has become instrumental in improving a company's overall compliance, as well as protecting its reputation.

A strong CLO / GC can establish the practices that reinforce a corporate culture that values ethics and integrity. But this value can only occur if the CLO / GC is properly situated within the company, and the legal department has effective interactions with the company's business units. A management team that marginalizes the CLO / GC and the legal department not only loses out on this risk-management perspective, but also sends a company-wide message that legal risk, ethics, and compliance are not taken seriously.

- vi) As mentioned above, the organization is the CLO / GC's client, and if the CLO / GC is overly beholden to Senior Management, the result may be advice and counsel that does not prioritize what is best for the organization. Additionally, if such a perception is widely held throughout the organization, it can erode the confidence that lower-level employees place in the Legal Department. The CLO / GC should be seen as the senior executive most capable of pushing back on management decisions that put the company at legal or reputational risk. There must be a willingness by the CLO / GC to raise issues with the Board, even if doing so may threaten his or her own standing with the CEO and other executives.
- vii) One important caveat to the above: However an organization determines to facilitate the Legal Department's involvement in decisions, it should not be done in a way that negates individual lawyers' accountability to the CLO / GC. Several of the notable corporate scandals have been blamed, in part, on a lack of accountability between the CLO / GC and the line attorneys who had often seen signs of questionable corporate conduct. In other words, the attorneys who reported directly to business leaders were less effective in elevating issues of concern to the appropriate levels within the company. There should be CLO / GC oversight - perhaps a dotted-line reporting

structure - over lawyers assigned to the business units to ensure proper reporting of issues of concern.

- c) Questions for Discussion: How have you dealt with this tension between representing the organization and the expectations of staff when it comes to employment and staff culture issues?
- 5) TREACHEROUS TREKKING THROUGH TECHNOLOGY. All in-house counsel need to be on high alert regarding the rapidly changing landscape of technology-related legal developments, including cybersecurity, data privacy, and AI. Beyond tracking these developments, the CLO / GC and his/her team must earn the trust of his/her business colleagues when it comes to their understanding and advice regarding the laws, regulations, and best practices applicable to their organization, whether that is by their own skills and experience or leveraging the wise input of outside counsel in relevant issues.
- a) The following are ways to earn that trust, including the CLO / GC's demonstration that he/she knows how to incorporate technology into enhancing the Legal Department's services to the rest of the organization:
 - i) Using AI to enhance the Legal Department's processes while dealing with contracts and monitoring intellectual property infringement.
 - ii) Focusing on new cybersecurity and data security measures that reflect best practices implemented nationally and globally.
 - iii) Educating the CEO and weaving a culture of privacy and security into the day-to-day operations of their organization.
 - iv) Developing a comprehensive cybersecurity plan by working closely with IT departments to address potential risks and vulnerabilities, including those related to large language models.
 - v) Conducting regular risk assessments helps identify potential threats, including those posed by large language models, and allows legal departments to proactively address them before they escalate.
 - vi) Having a well-defined incident response plan in place ensures that the legal department can react quickly and effectively to cybersecurity incidents, minimizing potential damage.
 - vii) Partnering with external cybersecurity experts who can provide valuable insights and expertise in managing cybersecurity risks, including those related to large language models.
 - b) Remaining Challenges:
 - i) Maintaining confidentiality: In-house legal departments handle sensitive information, including intellectual property, trade secrets, and employee data. Ensuring the confidentiality of this information is critical to protect the company's reputation and avoid legal liabilities.¹¹

¹¹ Natasha Babazadeh, "Legal Ethics and Cybersecurity," *Journal of Law & Cyber Warfare*, vol. 7, no. 1 (Fall 2018), pp. 85-116.

- ii) Compliance with laws and regulations. In-house legal teams must navigate a complex web of data protection regulations, such as GDPR, CCPA, and HIPAA, and ensure their organizations maintain compliance. With recent reforms and increased penalties, the importance of compliance has become even more apparent. Since GDPR, no uniform privacy law in the U.S. appears imminent. However, the number of states that have passed privacy laws is continuing to grow.¹²
 - iii) Vendor management: Legal Departments often rely on third-party vendors for various services, which may introduce additional cybersecurity risks. Managing vendor relationships and ensuring their security practices align with the company's standards is crucial.
 - iv) Training and education: In-house legal departments must ensure that employees throughout the organization are aware of cybersecurity best practices, policies, and procedures to minimize the risk of data breaches. Collaborating with internal and external cybersecurity experts can help strengthen the organization's overall security posture.
 - v) Staying informed about the potential risks posed by technology and pro-actively developing strategies to mitigate any threats. Know the federal and state law developments (including pending bills in applicable states) and international legal trends.
- c) Focus especially on developments in AI and AI law:
- i) Regulatory and Legislative Trends.
 - (1) Currently there is no comprehensive federal AI law, but there is regulatory guidance including a White House Executive Order¹³ and statements from the SEC, EEOC, NLBR, USPTO, USCO, and numerous other federal agencies.
 - (2) However, the FTC has signaled greater scrutiny of the use of AI is coming.
 - (a) A recent FTC advance notice of public rulemaking requests comment from the public on whether the FTC should “forbid or limit the development, design, and use of automated decision-making systems that generate or otherwise facilitate outcomes that [are “unfair” or “deceptive”].”¹⁴
 - (b) Given the FTC's broad and fluid interpretation of what constitutes “unfair” outcomes, a business seeking to implement AI needs to carefully consider the various ways that it could impact individuals and ensure that it could defend its use.
 - (c) The FTC has recently blogged that “If you develop or offer a synthetic media or generative AI product, consider at the design stage and thereafter the

¹² See the International Association of Privacy Professionals (IAPP)'s state privacy law tracker: <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/>. See Vanessa Perumal, "The Future of U.S. Data Privacy: Lessons from the GDPR and State Legislation," *Notre Dame Journal of International and Comparative Law*, vol. 12, no. 1 (2022), pp. 3-14.

¹³ Executive Order 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," October 30, 2023.

¹⁴ <https://www.ftc.gov/legal-library/browse/federal-register-notices/commercial-surveillance-data-security-rulemaking>

reasonably foreseeable — and often obvious — ways it could be misused for fraud or cause other harm.”¹⁵

- (d) The FTC is also concerned about false or exaggerated claims about the use of AI and of the capability of AI-enabled products and service. Other federal agencies are following the FTC’s lead, and on April 25, 2023, the FTC issued a joint statement with the CFPB, DOJ and EEOC explaining that each agency would be using their respective enforcement authorities to regulate use of AI to protect consumers from discrimination, bias and other harms.¹⁶
- (3) Colorado Artificial Intelligence Act: places disclosure obligations on developers and deployers of high-risk artificial intelligence systems to protect consumers from algorithmic discrimination in connection with consequential decisions.¹⁷
- (4) Utah Artificial Intelligence Policy Act: requires disclosures to individuals regarding their interactions with generative AI only if asked; but requiring regulated occupations (e.g., those requiring a license or state certification) to provide clients, patients, and customers with a clear disclosure at the start of the communication.¹⁸
- ii) Be aware of international / comparative legal developments, such as the following developments reported in Cybersecurity Law & Strategy, an ALM publication for privacy and security professionals:¹⁹
 - (1) Canada is considering comprehensive AI legislation: the Artificial Intelligence and Data Act, which proposes to regulate how AI is developed and used.
 - (2) “The European Union is considering new legal frameworks, including the EU AI Act or a new Directive on AI liability. The European Union’s supervisory authorities are not waiting for specific AI legislation and are already looking at AI through the lens of data protection law, launching investigations into the use of personal data to train AI, and, in some territories, have even taken action (including temporary bans in Italy) on providers of AI services.”
 - (3) China issued for public comment, its draft Administrative Measures for Generative Artificial Intelligence Services on April 11, 2023, which consultation closed on May 10, 2023, and which proposed that a security assessment must be filed on services provided to the public from generative AI.
 - (4) South Korea is in the process of passing into law its Act on Promotion of AI Industry and Framework for Establishing Trustworthy AI, which will identify what is classified as high-risk AI for which more stringent requirements will be imposed.
- iii) Advising on cybersecurity and data privacy/security:
 - (1) By sharing sensitive internal trade secrets, internal personnel information, information deemed confidential in NDA or other contracts, and donor

¹⁵ <https://www.ftc.gov/business-guidance/blog/2023/03/chatbots-deepfakes-voice-clones-ai-deception-sale>

¹⁶ https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf

¹⁷ Colorado Senate Bill 24-205 (SB205).

¹⁸ Utah S.B. 149 (2024).

¹⁹ Charmian Aw et al., "AI Considerations for In-House Counsel," Cybersecurity Law & Strategy, June 12, 2023.

- information in ChatGPT or another generative AI model, a third-party user might access it through relevant queries.
- (2) Alert employees of risks such as data leakage, breach of organization's data retention policy, breach of contract, and privacy litigation; in the absence of IT training, policy, and approval, shadow IT and AI practices may emerge.
 - (3) Train employees to refrain from disclosing donor information, information about an upcoming product or service, marketing strategies, coding, etc. Establish clear policies on data handling, security, and training; and increase internal security measures and understanding of adverse consequences (e.g., termination, suspension, etc.).
- iv) Advising on intellectual property ramifications. For example:
- (1) According to terms of services for AI models, responsibility for output belongs to input provider. For example, you could ask for marketing material that results in output that includes copyrighted content (writing, photos, or artwork) without proper attribution or permission.
 - (2) Use of AI to combat infringements: If you download images or text from the Internet and use it on ABS website, AI scouring devices can detect if your website is using their copyrighted material.
 - (3) Be aware that generative AI could use open-source libraries and integrate that code in their products, leading to breaches of open-source software licenses. Recently, several coders sued GitHub, Microsoft, and OpenAI because GitHub Copilot, which converts commands written in plain English into computer code in dozens of different coding language, was trained and developed on billions of lines of open-source code that had already been written, leading to challenges over attribution.²⁰ NOTE: Individuals who operate in open-source community are accustomed to using open-source software and making sure they make proper attributions since that is condition of using the open-source software. But AI may miss the attribution.
 - (4) Lead in taking action steps such as:
 - (a) Establishing documentation for AI development processes and sources.
 - (b) Implementing comprehensive tracking systems to help identify origin and compliance.
 - (c) Reviewing and documenting source of AI training data.
 - (d) Ensuring proper attribution whenever possible.
 - (e) Consulting with legal experts who are monitoring IP laws covering the use of AI.
- v) Developing an AI Policy that outlines acceptable use, documents assessments that establish that AI systems are used in a manner consistent with the policy.
- (1) Beyond adopting an AI Policy, you should collaborate with your IT department to:
 - (2) Evaluate AI software products or functions currently used by ABS and prospective ones.
 - (3) Conduct risk assessments.
 - (4) Seek suitable insurance to address claims that traditional D&O liability and commercial general liability policies don't cover.

²⁰ Doe v. Github, No. 22-cv-06823-JST (N.D. Cal. 2023).

- d) There has been a significant increase in cybersecurity issues in the contracting phase, in procuring insurance, and helping staff understand the importance of cybersecurity and cyber insurance coverage.
- 6) CHOICE OF LEGAL DOMICILE. Many Christian ministries have a historic connection to a particular city or state, and that is reflected in their state of incorporation. However, if the legal and regulatory climate for the ministry's state of incorporation becomes increasingly hostile toward faith-based organizations or provides less liability protection, a CLO / GC may well need to recommend to the President/CEO and the Board of Directors that the ministry consider changing its legal domicile to another state.
- a) Tax-Exempt Implications:
 - i) Years ago, a transfer its legal domicile to another state meant that the ministry would have to form a separate corporation in another state, and then merge the existing one with the new one, and then apply for a new letter of determination from the IRS. Thankfully, that changed in 2018.
 - ii) In many cases, a tax-exempt organization changing its state of incorporation (domicile) will not need to file a new application for federal tax exemption, as long as it keeps the same Employer Identification Number (EIN). Previously, re-application was often required for organizations undergoing restructuring, including changing their state of incorporation. This change was made through IRS Revenue Procedure 2018-15, effective January 1, 2018, to reduce the administrative burden on qualifying organizations.
 - iii) Organizations changing their state of incorporation must report the change on their next annual Form 990. This includes attaching the organizing or restructuring document and reporting the new address. A change of address can also be reported separately using Form 8822-B, Change of Address - Business, which can be filed at any time to update mailing or location information.
 - iv) Types of Restructuring Covered: IRS Revenue Procedure 2018-15 applies to four types of restructurings for Section 501(c)(3) domestic corporations: incorporating an unincorporated association, reincorporating or domesticating under a different state's laws, or a statutory merger of corporations.
 - b) Key Considerations: The CLO / GC should consider the following questions when advising ministry leadership about a potential change of domicile:
 - i) What state(s) has a historical connection with the organization's founder, its headquarters, or its central mission or movement?
 - ii) What states are most protective of faith-based nonprofit tax-exempt organizations, as reflected by its laws protecting religious exercise, religious assembly, religious

- criteria in employment and provision of facilities, and its treatment of religious entities in the charitable solicitation registration process?
- iii) What states are most accommodating towards nonprofit organizations, as reflected by the customer service of its state corporations division, the lightness of its regulatory requirements; and the reputation of its state attorney general and other government officials with respect to prosecuting nonprofit organizations (especially religious entities) for political gain?
 - iv) Are the state's corporate registration and renewal process is easily navigable?
 - v) What states provide a healthy degree of liability protection for individuals serving on the Board of Directors through mandatory or permissive indemnification, immunity, and/or limitation of liability provisions?
 - vi) What states provide a healthy degree of liability protection for individuals serving as compensated officers through provisions?
 - vii) What states are most accommodating toward the ministry's international operations (if any), including financial reporting, the use of foreign contractors, and travel reimbursements?
 - viii) Which states generally project a positive image to Americans and self-described Christians, and perhaps to the ministry's specific target audience?
- c) Other Considerations: The following are important questions for some ministries, but may not be important for ministries that already operate and/or fundraise in multiple states:
- i) What sales and use taxes are imposed? This is not really a factor for consideration of state of incorporation for ministries that are already committed to paying sales and use taxes in whichever state they receive goods and services and where they sell goods and services.
 - ii) Is charitable solicitation registration required? This is not really a factor for consideration of state of incorporation for ministries that already need to register in most states they fundraise in, regardless of where they are incorporated.
 - iii) Are State Unrelated Business Income Taxes imposed? This is also not a key factor for consideration of state of incorporation for ministries that already report UBI based on the location of investments, regardless of where they are incorporated.
- 7) FAITH AND IN-HOUSE PRACTICE. As in any profession, a Christian will find it challenging to integrate his or her faith in Christ while attempting to fulfill his or her responsibilities.
- a) Here are some common challenges:
- i) It will be tempting to pretend that you know more about the law than you actually do. Nobody likes to look stupid; yet we need to have integrity and humility.
 - ii) Attorneys are often disrespected and seen as obstructive; so others may see you as the last box to check off before launching a new initiative, and this means that you may be the last to weigh in and feel the pressure to go along with others' approval, even if they have ignored risks.

- iii) You report to a CEO or Board Chair who seeks your opinion, but only to validate their own.
- b) Question for Discussion: Could you suggest one strategic pro-active opportunity that in-house counsel could leverage due to our unique role and place in a ministry that might help organizations to not only minimize liability, but also help them to serve Christ more faithfully?