

How In-House Counsel and CFOs Team Up to Lead a Business

Ensuring finance and legal are in sync is key to reducing overall risk during certain and uncertain times. “How general counsel can team up with CFOs to lead a business through crisis”, *IFLR*, Olga Mack (November 27, 2023).

The duty increasingly imposed on in-house counsel to give strategic business advice as well as legal advice has made the relationship between in-house counsel and CFO critical. There are myriad issues, including statutory, regulatory, enforcement, litigation, and C-Suite and shareholder demands, that have also impacted this relationship.

Recently, during Legal Excellence Week, a panel of in-house lawyers discussed this complex relationship. Mr. John Sly, partner at Waranch & Brown, moderated “*Speaking the Language of Your CFO*” with expert in-house counsel panelists Maureen Dry-Wasson at Allegis Partners, Michael Sawicki, at Elliott Sidewalk Communities and Marisa A. Trasatti, at Sciton, Inc.

All in-house counsel wear multiple hats in their day to day communication with their business clients. Acting as the corporation’s in-house legal department, providing legal advice, drafting and reviewing contracts, and suggesting possible solutions are all common conversations counsel has with their client’s CFO. When communicating in this manner, all communications are most likely protected by the attorney-client privilege. When acting in your role as business advisor, however, the privilege does not always attach. All of the panel experts agreed that when rendering legal advice in writing or otherwise, it is important to protect the privilege by making it very clear that what you are saying is legal advice.

Likewise when acting as a business partner or strategist, it is important to state that you are giving advice in your role as a business advisor and not as legal counsel. If legal guidance is interlaced with business advice, you may want to consider hiring outside counsel to handle the legal aspects to ensure the privilege is not waived by interloping the two together. Wearing multiple hats requires in-house counsel to be “mindful throughout the day of what communications need to be protected both for the company and the attorney-client privilege standpoint,” said Mr. Sawicki.

There is a proliferation of communication apps that expose communications to the public, press, and possible future and present litigants. Mindful that every keystroke that is typed onto a computer is discoverable, it is a challenge to govern communications, especially when privileges may be exposed. The panelists discussed the difficulty of trying to manage and convince company employees to protect communications.

Ms. Dry-Wasson shared that one way her company handles this issue has been to formally adopt a written policy prohibiting employees from discussing confidential information through any format that has not been approved. However, she admits implementation is tough to achieve. She said if she needs to have a critical conversation with her CFO or other decision-makers, she simply “picks up the phone!” Mr. Sawicki agreed, stating that he encourages face-to-face meetings.

Another challenging area involving communications is when the law clearly does not allow your company to act or not act in a particular way. Sometimes it is the duty of in-house counsel to just say “no.” Ms. Trasatti shared a few ways to do this in a constructive manner. She advised to remain collaborative with your CFO and C-Suite at all times and to have “an open and frank dialogue with the decision makers involved.” There are black-and-white measures that the law clearly prohibits your company from taking and other issues where the law does not clearly dictate the company’s course of action. Ms. Trasatti “tries to be more than just a lawyer and balance the business with the legal practice, but there are instances” where the law requires her to say no that is not going to work.

Mr. Sawicki estimated that about “eighty percent of what in-house counsel does” in their interaction with the CFO is to drive revenue through contract negotiations, so his goal has always been to make the contract review process faster. Decreasing the amount of time the legal department spends on contract review sends a message to the CFO that you are not a roadblock, rather you are assisting in generating revenue. He recommended balancing contractual risks and communicating those risks to the CFO in a timely fashion through the contract review cycle to drive revenue and help the company become successful.

In summary: The attorney-client privilege applies in your general counsel role but may not necessarily apply in your business advisor role. When giving guidance to your CFO or other decision-makers, protect the privileges by ensuring they know what role you are executing when rendering advice. Use face-to-face meetings or phone conversations for the most important issues without resorting to emails or other written communication unless necessary. Learn to say no when the law clearly prohibits or requires your client to act in a particular manner and collaborate in all other circumstances. Help your client ultimately become financially successful by assisting with revenue-generating transactions in a timely manner. “How In-House Counsel Should Communicate With the CFO”, Pamela Langham, *Maryland State Bar Association, Inc.*, (March 8, 2023).