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BNA Interview

Layered, Unique Issues Face Public Company General Counsel

Bloomberg BNA recently conducted this interview with Michael A. Rule, McKenna Long & Aldridge LLP, about issues facing public company general counsel—in contrast to private company GCs.

Bloomberg BNA: What are some of the biggest challenges facing new public company GCs today?

Mike Rule: There exists a morass of legal, regulatory, confidentiality, privilege, disclosure, ethical and other issues for a GC of a public company to navigate on a regular basis. The issues, questions and considerations a public company's GC must be ready to address have been growing over the decades and not shrinking. Every well-intentioned piece of legislation or SEC ruling or significant court case—while often very logical and hard to argue with in their intent (i.e., they are usually aimed at reducing or eliminating the availability of some type of corporate corruption or misdeed that has surfaced)—have resulted in layers of requirements and have made a public GC's job tougher than ever.

Having a working understanding of those major “gotcha” areas is key.

BBNA: What unique challenges do GCs of public companies face that a private company GC might not? What are initial best practices that a GC should observe in making the transition from private to public company work?

Rule: Disclosure and reporting requirements, for starters. The SEC, private exchanges and certain internal charters (often created upon going public) to name a few, all bring to bear obligations that a private company GC does not necessarily have to face. It creates a real paradox in that a public company GC must disclose and allow the public to see certain key information about the company, whereas a private company GC would likely get fired if she or he let out such information, often very financially or operationally sensitive and safe-guarded. It is important, thus, to know what must go in, what can stay out and under what circumstances.

Best advice for new public company GCs: Get yourself trusted and experienced outside corporate

counsel right away, make sure the CEO, CFO and/or board know how important it is to each of them personally to have same and get it put into the annual legal-spend budget. It is part of being public and it is no joke.

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BBNA: What are some of the multi-jurisdictional issues presented to new public company GCs, and what are the best methods of dealing with those issues?

Rule: Solicitation and material, non-public disclosures are just an example. It is important for a public company GC not only to understand the multi-jurisdictional nature of being public, but to drill it into everybody at the company—everybody, not just the board members and C-level executives—that they mustn't tell anybody anything without clearing it with counsel first. Often, the pre-disclosure involvement of the GC will prevent things like unpermitted solicitations of the company's stock, unregistered promotion of a company's franchises and other unintended negative events and consequences. And

Michael A. Rule is an Orange County, Calif. partner with McKenna Long & Aldridge LLP, which recently merged with Dentons US LLP. For the past 13 years, he has represented public and private corporations as their outside general counsel on a regular basis, with specific emphasis on counseling inside GCs (and CFOs/CEOs when no inside GC exists). Prior to that, he spent seven years as in-house senior legal counsel for a private company that went public under his watch and then became the executive vice president, general counsel to that company.

while best to avoid these things outright, it is worth noting that different jurisdictions may have different rules (and penalties) for these types of transgressions.

BBNA: What is the nature of a public company GC's relationship with the board of directors and the rest of the executive team? How should a new GC best develop these relationships?

Rule: The public company GC's role is often key to gathering, assimilating and coordinating both the company's and these individuals' relevant information. When it comes to required disclosures, filings and communications, it is vital for the GC to be fully informed about the individuals' relevant outside activities and affiliations, as well as their inside roles and activities. That said, the GC's role can require some real diplomacy and tip-toeing when it comes to communications directly with these individuals who are, basically, her or his superiors in the company and in most real respects, are responsible for her or his employment there. Not to mention, practically speaking, board

members are often of some financial means, some industry reputation or come from some private equity group or other significant investor in the company, and often come loaded with their own counsel, to which they prefer to defer over the GC. Affording all concerned with the best-available protections and advice requires tact, patience, resolve, toughness, diplomacy and maybe most importantly, a sense of humor.

BBNA: What differences are there in managing the operations of a public company legal department, as opposed to that of a private company? What operational management skills, or learning opportunities, should new GCs seek out first?

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Rule: Scrutiny on a public company's legal compliance is at an all-time

high, for better or worse. The public company's legal team (and obviously, its chief legal person), have a delicate but vital role to play in keeping the company on the straight and narrow. The GC of a public company, while still having most of the same issues she or he had in a private company—such as litigation management, IP maintenance, contract and lease reviews, operational licensing, state and regulatory compliance, and other relevant industry issues—also has a litany of additional responsibilities brought about by the public nature of the company. Dealing with the SEC, individual stock exchanges, transfer agents, outside auditors, etc., and the myriad of disclosures and reporting requirements attached thereto, require an ongoing education in all substantive legal areas, as well as an understanding of the GC's perceived role: you are the one person people will look to, above all others, to obtain the right answers, fully and accurately communicate the obligations while balancing the risks, and ensure that the company and its key individuals stay on the right side of the law. Simple enough, right?