

In recent times, a string of general counsel have stepped down over options-backdating allegations, at least one has exercised Fifth Amendment rights against self-incrimination before a Congressional Committee, others face civil or criminal indictments, and some have been found guilty of various charges.

herring. Instead, in-house and outside counsel will be more effective gatekeepers—for the public benefit, and the reputation of the legal profession—when each helps cover the other’s inherent impediments in their respective capacities informally to monitor and interdict misconduct.

“First, in order to be successful, gatekeepers must not only be willing to disrupt misconduct but also be capable of doing so. Second, gatekeepers must not only be prepared to interdict misconduct but also monitor to detect such happenings in the first place.”

Intersecting these observations reveals four necessary components of effective gatekeeping, outlined in the following four quadrants.

Lawyers as Gatekeepers: Part One

BY RONALD F. POL

Do these events support what some judges and outside counsel have suggested? That is, as employees—more exposed to pressure and reprisals—in-house counsel are “less independent” than their law firm colleagues not beholden to any individual client.

Similarly in relation to the independent “gatekeeping” function performed by professionals such as lawyers and accountants, acting in effect as private intermediaries capable of disrupting misconduct by managers who need their services to perpetrate market harm.¹ Are outside counsel inherently better able to exercise an effective gatekeeping function than their in-house colleagues?

A detailed study reveals a more complex position.² The reality is that in some respects outside counsel do indeed have the edge, yet in others in-house counsel have an overwhelming advantage.

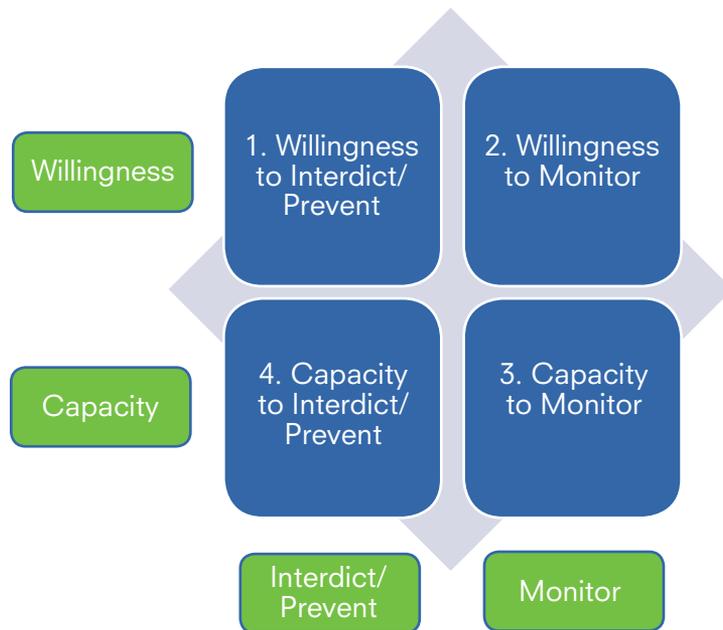
Rather than an “independence contest” in which combatants marshal their forces to assert reasons why in-house or outside counsel are inherently “more independent,” objective analysis reveals that “independence” by itself may be a red

Four Quadrants of Gatekeeping

Traditional gatekeeping theory requires professionals “who can and will prevent misconduct reliably, regardless of the preferences and market alternatives of wrongdoers.”³ Professor Kim isolates key elements of the gatekeeper function in developing performance criteria to measure the gatekeeping potential of any professional, based on two observations:

Explaining Each quadrant:

1. Willingness to Interdict/Prevent. On discovering potential illegality, will the gatekeeper do something to stop it? Framed overtly as an ethical question, most professionals would of course do so, but in practice the circumstances are seldom clear. Numerous experiments also demonstrate that we *unconsciously* process complex and ambiguous information within the context of self-interest; “law firm



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partners deny the moral dimensions of their work, inside counsel report experiencing little ethical conflict in their jobs, and experienced business managers do not frame situations in moral terms,” states Professor Kim. A behaviorally realistic model therefore recognizes the reality that we might fail to perceive any particular moment of ethical choice.

2. Willingness to Monitor. When possible misconduct arises, will the gatekeeper probe further?
3. Capacity to Monitor. Earnest vigilance and probing into the facts will fail to uncover misconduct if the gatekeeper has no access to the facts.
4. Capacity to Interdict/Prevent. A gatekeeper willing and able to monitor and willing to interdict

when necessary will have no capacity to do so if the wrongdoer can circumvent that particular professional.

“By systematically running both inside and outside counsel through this analytic mill,” Professor Kim arrives at some “unexpected conclusions about the relative strengths and weaknesses of inside and outside counsel for the gatekeeping role.”

Next month’s column will outline the analysis and conclusions. In the meantime, readers might wish to consider in relation to each quadrant whether in-house or outside counsel have the edge; simply place an “I” or “O” in each quadrant to reflect your initial conclusions. 

Have a comment on this article?
Email editorinchief@acc.com.

NOTES

- 1 Gatekeeping in this context excludes formal requirements to report misconduct to external authorities or breach any privilege. “Gatekeepers” include professionals in a position to decline when their services will be misused; in other words “de facto beat cops” able to disrupt misconduct by their advice and actions, including withholding cooperation and “legal sign-off.”
- 2 Sung Hui Kim, *Gatekeepers Inside Out*, 21 *Geo J Leg Ethics* 411 (2008). The author thanks David Rutherford for bringing this study to his attention.
- 3 Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 *J L Econ & Org* 53 (1986).

Lawyers as Gatekeepers: Part Two

BY RONALD F. POL

Part 1 outlined a detailed study¹ of the independent gatekeeping function performed by lawyers, in effect disrupting potential misconduct by managers who need their services to perpetrate market harm. Using the “Four Quadrants” diagram from *Part 1*, this article outlines Professor Kim’s analysis and conclusions, challenging the view that outside counsel are more independent and better able to exercise an effective gatekeeping function than their in-house colleagues.

Quadrant 1—Willingness to Interdict/Prevent

Obedience pressures (as employees) and conformity pressures (as team players) rest more heavily on in-house counsel, but in modern practice, small teams of outside lawyers typically interact with a relatively small number of client representatives; so outside lawyers are also influenced by team-player pressures to facilitate client objectives.

Gatekeepers are more likely to interdict if the costs of acquiescing in misconduct are high. The risk of reputational harm was often regarded as a more significant factor for law firms than individual lawyers, but with intense competition, firms may now be more concerned to develop reputations for client focus than client independence, so this difference may be less pronounced. The threat of private civil li-

ability and enforcement risks are also higher for in-house counsel as officers of the company, further reducing comparative differences between in-house and outside counsel.

Gatekeepers are also more likely to interdict if the costs of resisting misconduct are small. Law firms with large, diversified client bases have traditionally been regarded as better gatekeepers than individual professionals for whom the client represents a bigger proportion of their revenue or remuneration. However:

- As firms grow, the *nominal* gatekeeper remains the firm but the *functional* gatekeepers are typically small teams responsible for the client, with proportionately more at stake than the firm.
- Sociological research suggests that larger firms may actually be *more* dependent on particular clients. A Chicago study² found that smaller firms spent a “smaller share of

their time on the client for whom they did the most work” than lawyers in larger firms who “had fewer clients and billed significantly more time to their leading client.”

- The risk of losing any client carries less weight under traditional lock-step compensation models in which partner income is shared across the client base, but sanctions for failing to meet billing thresholds and modern eat-what-you-kill compensation schemes based on individual and team contributions add pressure to keep the client.

The reality is that individual partners as functional gatekeepers for large clients face heavy demands to be team players, substantially increasing costs associated with resisting misconduct, and narrowing the gap between in-house and outside counsel’s willingness to act in the face of potential transgression.

Quadrant 2—Willingness to Monitor

Although outside counsel often help develop compliance programs, they are unlikely to monitor ongoing compliance unless they can charge for it. General counsel are also typically responsible for these programs and have an edge over outside lawyers’ willingness to monitor compliance.

Quadrant 3—Capacity to Monitor

In-house counsel have greater access to facts about management behavior, through formal and informal channels than their outside colleagues. By contrast, exchanges with outside counsel are more carefully managed, reducing their comparative capacity to monitor prospective wrongdoing.



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Quadrant 4—Capacity to Interdict/Prevent

Analysis of this quadrant depends on the ease with which wrongdoers can circumvent gatekeepers.

If a company has only one law firm, market participants and commentators may become suspicious by serial firing and hiring of firms in an apparent search for compliant lawyers, but most large organizations operate a panel of law firms so it may be easier to circumvent particular firms. Although not mentioned in the paper, the legal department may itself help constrain the ability of managers to shop around for compliant law firms, particularly if the general counsel is responsible for selecting and managing firms.

The ability for managers to cherry-pick amongst the in-house lawyers for

better team players is also constrained, both formally and informally—by structures in which the legal department assigns work, and with in-house counsel's access to informal channels likely to reveal such gaming. Internal policies requiring legal department involvement also increase in-house counsel's relative capacity to prevent misconduct.

Important role for lawyers

Professor Kim concludes that in-house counsel have a greater *capacity* to monitor potential misconduct and may be more *willing* to do so. In-house counsel also have a greater *capacity* to interdict, although outside lawyers may be more *willing* to do so once they find evidence of misconduct, but the difference may be less pronounced than previously assumed.

Assertions that outside counsel are more independent than in-house counsel are therefore overly simplistic; outside professionals are not necessarily more effective gatekeepers than their in-house colleagues. Instead, structures that capitalize on the strengths and minimize the respective weaknesses of in-house and outside counsel will ultimately be more effective, for the benefit of ethical organizations and the public, and the legal profession's reputation. 

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NOTES

- 1 Kim, Sung Hui, *Gatekeepers Inside Out*, 21 Geo. J. Leg. Ethics 411 (2008).
- 2 John P. Heinz et al., *Urban Lawyers: The New Social Structure of The Bar*, Univ. of Chicago Press (2005).

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