

The twenty-first century lawyer as analytic strategist and innovator

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In the following article, Ken Grady discusses the evolving role of the general counsel and how they can use strategic skills to maximize their organization's competitive advantage within applicable legal, ethical, and moral constraints. He highlights the fact that many general counsel lack certain skills in data and analytics and that the value of their strategic guidance could partly dependent on the breadth of information they could bring to bear on that guidance. While this article focuses on general counsel specifically, the advice it contains regarding evolving legal roles and new organizational expectations and needs can be applied to other senior lawyers.

TWO TRENDS converged early in the twenty-first century which will change the roles of general counsel. First, the big data movement gained force. The legal industry has focused its big data efforts on the costs of legal services and eDiscovery. While these are good data uses, longer-term data provides law with more valuable opportunities. Organizations will save more money by avoiding legal costs rather than simply reducing them through using resources more efficiently – as long as doing so does not hinder their competitive advantage. Generating predictive and even prescriptive analytics on existing and new data sets will help organizations mitigate future risks. (Most legal analytics have been descriptive – such as legal cost analyses – which simply describe what happened. Some are predictive, providing lawyers and clients with metrics they can use to take action and change behavior. Prescriptive analytics is a new, but rapidly evolving area that forecasts what will happen, when it will happen, why it will happen, and it provides action recommendations to take advantage of the predictions.)

Second, clients want general counsel to focus more on strategy and less on routine tasks. For decades, general counsel have focused mostly on functional legal work, though in recent years some have had a growing role in strategy development and innovative approaches to risk management. With the pivot to focusing more on strategy, general counsel need to expand their predictive toolkit beyond intuition and judgment. Their value to corporations increases as they integrate strategic thinking and risk management in new ways, based on quantitative as well as intuitive and experiential thinking. As their colleagues

in other disciplines know, intuition and judgment without data and analytics are insufficient. These two trends – predictive and prescriptive analytics and strategic focus – are pushing general counsel to become analytic strategists and innovators.

Twenty-first century general counsel

It is the yearend and, as general counsel, you look back over what your law department has accomplished as you prepare for next year. The department's spending came in slightly below budget due to strong matter management and increased value fee use. Clients consistently gave the department high marks on getting legal work done, with the usual gripes about everything taking too long. Your team generally seemed satisfied, though ever-increasing workloads continued to drive questions about how lawyers could handle the additional work without the department growing or the budget for outside law firms rising. Overall, you are satisfied with the year.

Your annual reviews with the CEO and the non-executive lead director generally were upbeat. But, both emphasized the need to evolve your role. They agreed the law department was fulfilling its basic functions. They emphasized, however, that a leader at the general counsel level should have more strategic focus and an innovative approach to managing risk. They saw your value to the corporation increasing as you used your strategic skills to maximize the corporation's competitive advantage within applicable legal, ethical, and moral constraints. As the CEO and lead director noted, however, the value of your strategic guidance would be partly dependent on the breadth of information you could bring to bear on that guidance. While your 25 years of practicing law gave you some perspective, in the fast-moving global business world, you would need more than your personal experiences over those 25 years. Your value would come not just from what you knew, but your ability to work with others as part of a collaborative team that could marshal a much larger body of data, analytics, and experiences, and bring that vast corpus of knowledge to bear on the corporation's evolving business strategies.

General counsel as strategists

A 2013 joint study by the Association of Corporate Counsel and the Center for the Study of the Legal Profession at Georgetown University Law Center, "Skills for the 21st Century General Counsel", reported that boards of directors and CEOs want their general counsel to increase their value and contributions through more strategic input.¹ As the study stated: "general counsel will need to enhance their strategic capabilities if they wish to remain relevant in this fast-paced, ever-changing global business environment." Similarly, a 2012 article, "The New Path To the C-Suite" published in the *Harvard Business Review*,

noted that the general counsel role continues to evolve towards a broader role, more akin to the roles of other executive peers.² The authors found that “the skills that help you climb to the top won’t suffice once you get there.” As the article stated: “[t]o manage outside law firms, general counsels will have to develop new strengths in strategic and business knowledge, financial skills, and collaboration.” General counsel have strong analytical skills, judgment, and experience with business situations. Companies pay a lot for that combination, and they increasingly want to use it more strategically.

While general counsel are gratified by the increasing significance of their roles, the change comes with significant challenges. In particular, general counsel frequently lack some of the skills their peers have, which will be important to their success as strategists. Among those missing skills are data acquisition and analytics. Unlike their peers – who usually have formal education in data gathering and analysis and years of using those skills as they climbed the management ranks – general counsel typically have less education and experience with data and analytics. They also do not have continuing exposure across multiple enterprises in many industries and geographies to business strategies modified to reduce risks given the data and analytics.

General counsel as innovators

In addition to general counsel focusing more on strategy, they face the continuing challenge of doing more with less. This challenge draws on general counsel’s basic management skills. But, the changing legal industry opens many opportunities for innovative approaches. As Clayton M. Christenson’s book, *The Innovator’s Dilemma*, taught us, there are two types of innovation – disruptive and sustaining.³ We most often talk about disruptive innovation. It brings something new to the industry. While performance levels may drop at first, it “bring[s] to a market a very different value proposition than had been available previously.” For most general counsel, sustaining innovation is more relevant, as it “improve[s] the performance of established products, along the dimensions of performance that mainstream customers in major markets have historically valued.”⁴ Forward-looking general counsel will tackle their challenge of doing “more for less” using data and analytics. They will innovate solutions, reducing burdens on law departments by mitigating risks that drive the more significant and costly resource drains. As general counsel know, the cheapest lawsuit is the one that never happened, and predictive and prescriptive analytics will help them mold strategies to avoid those lawsuits.

New skills for general counsel

Even if general counsel need broader skills to succeed than it took to get them their roles, do they really need data and analytics skills and broad exposure to

evolving business and risk strategies outside their industries? Absolutely. Great intuition, judgment, and strong legal skills are necessary, but in a world where data growth is massive and in many cases reasonably available, general counsel need to get comfortable with law becoming more quantitative and strategically complex.

General counsel also need new types of support from their law firms or other providers, if the law firms do not step up to the challenge. CEOs use McKinsey, BCG, Bain or other firms for strategic support. CIOs use IBM or SAP, Human Resource EVPs use Mercer or Towers Watson, and so on. These third parties provide a wealth of resources, skills, insights, and expertise the executives would find difficult or impossible to replicate internally. Law firms will evolve to supply similar support to general counsel (or will be replaced for this role by other solution providers). General counsel will want law firms to provide analytical and strategic support coupled with deep client and industry knowledge on which to base predictive and prescriptive solutions. General counsel without such support will be disadvantaged when trying to fill their roles as strategists and innovators.

Legal data and analytics – Eras of the past

It is not surprising that general counsel need more data and analytics skills. We have experienced two eras of legal data and analytics, and have recently entered the third era. Until now, the data and analytics skills demanded of general counsel were almost nonexistent.

The first era started in the early 1900s, and was launched by the famous case *Muller v Oregon* 208 U.S. 412 decided by the Supreme Court of the United States in 1908. In 1905, a laundress in Oregon complained because her employer required her to work more than ten hours per day. Oregon had passed a law in 1903 limiting work days for women in certain businesses to ten hours per day. The laundry owner was convicted, fined \$10, and the case was appealed up to the Supreme Court. Louis D. Brandeis, the future Supreme Court Justice, was hired to represent the State of Oregon. His brief to the Court contained about two pages of legal arguments and more than 100 pages of surveys, statistics, and other information supporting the idea that working hours for women should be limited. This style of brief, legal reasoning supported by extensive data, became known as the 'Brandeis Brief'. The Brandeis Brief marked the beginning of analytics in law.

The second era began roughly in the 1970s. The billable hour was firmly entrenched by then, so firms and law departments began analyzing the costs and productivity of in-house and law firm lawyers. Analytics focused on the hours and costs of legal services, because the data was available. More recently, analytics expanded to include eDiscovery as lawyers and vendors

found additional data sets. Although the analyses have been useful, they have been limited to focusing on the costs of what lawyers do and streamlining discovery (also driven largely by costs).

The third era began in the twenty-first century. In this era, analytics are being used to analyze behaviors, evaluate trends, and mitigate risks. Because this era shows great promise, could have a far reaching impact on the practice of law, and encompasses the data and analytics skills general counsel need, it should be explored in more detail.

The new data and legal analytics era

The third era of legal analytics coincides with the broader era of big data and dates back just a few years. A vast and rapidly growing universe of digital data, cheap digital memory, and increasingly sophisticated software are providing the grist for the analytics mill.⁵ Social media sites collect billions of data breadcrumbs telling us not just what people think, but what they actually do. Governments are slowly making available their troves of data. New devices are released almost daily allowing businesses and individuals to collect very detailed information about behaviors.

We call the science of sifting through all this data “reality mining”. Reality mining is the collection and analysis of machine-sensed environmental data pertaining to human social behavior, with the goal of identifying predictable patterns of behavior. While it raises many complex legal issues, reality mining also presents enormous possibilities for understanding and changing what people do and has given rise to the science of “social physics”.

Social physics is an early 1800s term attributed to August Comte, who eventually replaced it with the term “sociology”. Today, Alex Pentland the Toshiba Professor of Media Arts and Sciences and the director of the Human Dynamics Laboratory at MIT defines social physics as “a quantitative social science that describes reliable, mathematical connections between information and idea flow on the one hand and people’s behavior on the other.”⁶ It addresses the way human social networks spread ideas and transform ideas into behaviors.

Legal physics, a term used by Daniel Greenwood, a non-practicing lawyer and Visiting Scientist at the MIT Media Lab, means “the social science that involves the study of legal matters and their motion through space and time, along with related concepts such as resource allocation and enforceability.”⁷ It is, in essence, social physics applied specifically to legal matters. Legal physics is part of a broader effort to bring data and analytics to the law under the heading “computational legal studies”.

So how do all these new areas of study tie together with law? From the legal industry’s perspective, they are a path to moving from intuition and

experiential judgment, to intuition and judgment illuminated by data and behavior. For example, when evaluating past events – the incidents leading up to a possible lawsuit – lawyers could provide guidance based on behavior (actual lawsuits) if they have data and analytics telling them the outcomes of other similar situations (e.g. analysis of employment claims across a wide range of individuals including those that did not go to trial). While lawyers provide guidance today, they do so based on small sample sets (cases they have encountered) compared to the thousands of such lawsuits that happen each year. Corporations value general counsel for many things, but key among them is providing sound ways to mitigate risk without unduly impacting competitive advantage. General counsel increase their value by interpreting the data and giving it life. As Nate Silver, well-known statistician, writer, and editor-in-chief of the *FiveThirtyEight* website has said: “The numbers have no way of speaking for themselves. We speak for them. We imbue them with meaning.”⁸ General counsel add further value by using the data to be more accurate, precise, and focused when mitigating risk so they do not put unnecessary competitive handcuffs on their businesses.

The most intriguing uses of data are predictive and prescriptive analytics. Lawyers can evaluate business strategies and put those strategies in the context of risk analyses based partially on analytics. Prescriptive analytics synthesizes data, mathematical sciences, computational sciences, and business rules to make predictions and then suggest decision options to take advantage of the predictions. By combining data about behaviors with data about risk outcomes, legal prescriptive analytics will provide options to tailor business strategies based on different risk profiles. General counsel can add their intuition and judgment, leading to more informed and nuanced advice to their executive peers. Rather than the “I’ve been doing this for 25 years, and I think...” statement, lawyers will be able to say “after looking at a variety of scenarios, and based on the data and analytics, I suggest...”. This is the practice of law moving from intuition and judgment, to intuition and judgment illuminated by data and analytics.

Legal data and analytics in practice

Today, law firms and general counsel are already extending the boundaries of using data and analytics by developing predictive solutions to inform and support business strategies. For example, one large financial institution had a portfolio of several hundred lawsuits in which the financial institution was the plaintiff. This portfolio constantly cycled, with new cases joining as they were filed and older cases dropping out as they went to trial or settled. The financial institution generally had good results, but wanted to do better. By examining the portfolio, the team found 18 variables that could be pulled from several

hundred lawsuits. The legal team ran multivariate analyses using these variables and identified three key variables that could shape outcomes. By adjusting these variables, which changed behaviors, the team could improve the overall performance of these lawsuits measured by time to recovery, likelihood of recovery, and average return on spending to recover. Better yet, the team identified variables they could use as early indicators that lawsuits would be more difficult or unsuccessful. The financial institution could adjust its behavior to mitigate the likelihood of the lawsuits.

Becoming a twenty-first century general counsel

General counsel and lawyers do not have to go back to school to acquire the skills of the twenty-first century. Thirty years ago, general counsel would have been excused for having a superficial understanding of their corporation's financial statements. Financial statements were the domain of the businesspersons and general counsel focused on law, not finance. Financial statement fluency became a necessary skill set for general counsel and they acquired fluency through many routes. Today, general counsel who do not have sophisticated understandings of corporate financial statements put themselves and their corporations at risk.

The path to becoming comfortable with data and analytics will be similar to the path followed to become financially literate. Although traditional classes are an option, most general counsel will acquire literacy through seminars, reading, and, most importantly, close and frequent work on projects with law firms or other service providers. General counsel do not have to become experts on data and analytics, but they should become skilled at working with data and analytics experts as part of teams that include broad sets of skills beyond lawyering.

The strategic and innovative general counsel

Go to law school, get experience in a law firm, move in-house, and work your way up to general counsel. The career paths of most general counsel have followed similar patterns. Becoming general counsel has required excellent legal skills, sufficient business skills, and the emotional intelligence to lead in the complex world of corporate politics. Most people date the era of modern general counsel to Benjamin W. Heineman, Jr. becoming general counsel of General Electric in 1987. In the intervening years, the general counsel role has changed significantly. Strategic skills have become more important, but the role has remained focused mostly on the core functions of the law department. In the twenty-first century, the general counsel role is again evolving. CEOs and board members expect general counsel to operate at the same strategic level, with the same business understanding, analytic skill sets, and vision across enterprises,

industries and geographies, as their executive peers. To meet this challenge, general counsel must develop data and analytic skills comparable to their peers and will need the support of law firms and other service providers who can support the strategic analysis, solution development, and broad exposure CEOs and boards want general counsel to provide.

About the author

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8. Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail-But Some Don't*, New York: Penguin Press, 2014, p.9. Mr. Silver is known for, among many things, creating PECOTA, a baseball forecasting system, and correctly predicting the winner of 49 of the 50 states in the 2008 presidential elections and the outcome of all 35 of the 2008 US Senate races.