This Wisdom of the Crowd, compiled from questions and responses posted on the ACC Small Law Departments and Law Department Management Committee eGroups*, addresses the issue of disclaimer messages in company emails. The issues discussed include:

I. The Difference Between "General Counsel" and "Chief Legal Officer"
II. Tailoring Your Title to Specific Legal Duties
III. Criteria for Senior Counsel

*(Permission was received from the ACC members quoted below prior to publishing their eGroup comments in this Wisdom of the Crowd resource.)

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I. The Difference Between “General Counsel” and “Chief Legal Officer”

Question:
I am wondering if there is a group consensus as to the designation "Chief Legal Officer" vs. "General Counsel." I understand generally that CLO is the more modern term and cements the C-Suite importance of the position. Are there any other considerations to consider?

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Response #1

I think the poster is correct - that CLO as a title mirrors and thus cements the C-suite nature of the position and is a "newer" title, where GC is more traditional and more widely used.

But I also think that the CLO title signals a focus on the role of the legal department's top lawyer to lead a team or set a tone that focuses on providing business solutions to problems, rather than just legal analysis. (I'm not suggesting that those with GC titles don't do this; I'm simply noting what a title may be more likely to connote.) The title "GC" is one that more clearly connects the lawyer's role to that of traditional lawyering - not at all a bad thing, of course! - but it may not suggest as strong a connection to the role of law in facilitating or adding value to the business, or as strong a connection to the role of the top lawyer in driving a well-managed and business-savvy team (both inside and outside) to solve complex company problems.

Your choice or award of one or the other title doesn't change your ethical obligations or your professional responsibilities ... it probably doesn't change a thing about the way you do your job, but it can impact how others perceive you - especially in a company where lawyers are a tiny minority of the leadership team, or perhaps not well known in the larger entity. Titles speak volumes in companies. That's my take, and why I've chosen or recommend "CLO" as a title for myself and to others who ask me.

(I would note that I carefully studied whether "CLO" seemed to impact the decision of regulators or prosecutors to include the top lawyer as a target or whether it might increase the opportunity for personal/executive liability in the event of a failure: it was not an issue in any of the cases I examined. Indeed, the more pertinent title that led to a suggestion that lawyers were responsible as fiduciaries for corporate failures stemmed from their titles that were specifically linked to roles that were
administrative in nature - such as Vice President, or Chief Compliance or Ethics Officer, or HR Director, or Privacy Officer, etc. - there was no correlation of an increased likelihood of charges filed based on the use of CLO vs. GC in my research.)

Now the really interesting question would be to see whether there is any appreciable difference in compensation based on one title or the other! 1

- Response #2
It's trendy, yes, but I've run across "chief legal officers" and "directors of legal affairs" who aren't real lawyers (they apparently just play one in the c-suite), so the "general counsel" is still the most assured way of knowing that you're dealing with a real lawyer. 2

- Response #3
In my view, CLO is also appropriate where the company may have divisional or subsidiary company general counsels who report, directly or informally, to the CLO at the parent company. 3

- Response #4
I would add some historical context. The CLO term may have existed earlier, but the designation developed considerably more currency (and controversy), at least among counsel at public companies, following enactment of Sarbanes-Oxley (July 2002). As you may recall, SOX added a Section 307 reporting up requirement to the professional responsibility of attorneys. Legislative scriveners trotted out this term used as descriptive terms in other federal statutes and regulations to assign responsibility and potential securities liability to lawyers practicing before the SEC.

As initially proposed by the SEC, the statute and proposed regulations required lawyers to report up to the chief legal officer or chief executive officer evidence of material violations of the securities laws, breaches of fiduciary duties or similar violations by the company or its agents. This requirement was then contemplated to transform in-house counsel into informants to the SEC if they reported up to the BOD and professionally determined the BOD was not responsive. Alternatively, the chief legal officer had to make a "noisy withdrawal", i.e., quit. Fortunately, reasonable minds prevailed to some extent in the final regulations adopted by the SEC under SOX. 17 CFR Sec. 205 et seq.

Since then, and perhaps tied with the C-craze, the descriptive term "chief legal officer" has become a popular, upper case CLO title, but obviously for different reasons. My surmise is that the title is used at companies in industries that have governmental regulations using that descriptive term. Otherwise, and especially if you are a department of one, reporting to the CBWasher, I suspect neither you nor anyone else should or will care. 4

- Response #5
It is popular to use the C-suite type designations - partly to show the GC is a peer of the CFO, CIO, etc. Chief Legal Officer (CLO) is one of many possible appellations that might apply to a General Counsel. For example: the GC, especially if serving as the Corporate Secretary, may also be the Chief Governance Officer (CGO); the GC also may serve as the Chief Compliance Officer (CCO); and a recent trend is to appoint a Chief Privacy Officer (CPO).

Sometimes these designations are not used as formal titles but rather used in internal or external communications to designate the individual who is responsible for oversight of a particular function or subject. For example: the company's compliance program materials may refer to the GC as CCO; the
company's privacy policy may refer to the GC as CPO; and the company's proxy materials and governance policies website may refer to the GC as CGO.

A company's GC is not necessarily the CLO. I've seen companies in which the top lawyer has a Chief Administrative Officer role, overseeing departments such as HR, Risk Management, Government Affairs, Corporate Secretary, as well as Legal. In such cases, the attorney running the Legal Department may be titled General Counsel, but they're not necessarily the CLO. But the SEC's up-the-ladder reporting regulations imply that the CLO should be a "real lawyer." The rule-making refers, for instance, to "chief legal counsel" as well as to the "chief legal officer."

Our board elected me for state law purposes as a Vice President. They've also given me the titles General Counsel and Corporate Secretary. They've also formally designated me as Chief Governance Officer, Chief Compliance Officer and Chief Privacy Officer, etc. I'd need 3x5 size business cards were I to use all of those designations as "titles." 5

Response #6
In the past these terms have been used interchangeably but there is a trend that indicates that this may be the "above tier" to the GC position; in this trend the GC is still the Chief Legal Officer but in a more day to day fashion, while the former title has a more executive management role and is the direct legal contact for directors, officers and especially investors in publicly traded companies (which is predominantly where you encounter this title). 6

II. Tailoring Your Title to Specific Legal Duties
Question:
The president of the company just suggested that we amend my title from General Counsel to something more appropriate to reflect my legal duties. He suggested General Counsel/Director of Regulatory Affairs. Any suggestions would be greatly appreciated!

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Response #1
At a previous company, my title was General Counsel & Compliance Officer, so that is another option that may work for your role. Many companies want one person clearly in charge of compliance consistent with direction from the US corporate sentencing guidelines and some of the corporate case law precedents. 7

Response #2
It's well known that a lawyer operating in a business capacity can lose the attorney-client privilege normally associated with her office. While it will always be a fact-based analysis, changing your title to reflect the recognition of your non-legal role will inevitably work against the case for privilege in the regulatory context. 8

Response #3
I'm GC for an SEC registered investment adviser. Investment advisers are required to have a chief
compliance officer. So my title is General Counsel & Chief Compliance Officer. It's a fairly common title for attorneys in mid-sized investment advisers. The comment about privilege is true - once you take on a non-attorney title - it raises the risk that communications might not be privileged. In the case of the CCO title - it is fairly well established that the SEC views compliance activities as not privileged. In a few cases, I've actually had to write memos to myself - from me as GC to me as CCO - in order to document the legal basis for a compliance position while still preserving privilege. I would imagine that other regulators would take a similar view.

Another downside to a non-legal title is that it might be harder to get credit for years of legal practice from a state bar if you're trying to get admitted to it based on years in practice if your title was something other than an attorney title. 9

III. Criteria for Senior Counsel

Question:

Do you use set criteria to designate in-house counsel as "Senior Counsel"? If so, is it year of call, expertise, supervising junior counsel, or something other?

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Response #1

My initial thought is that the criteria for this type of title could differ from company to company depending on the nature of your business, size and level of experience within the legal staff, etc. For example, in my legal department we have several lawyers performing similar duties but they have varying years of experience. The more experienced lawyers have the title of Senior Counsel. It isn't tied to supervisory duties because the way our department is structured, those opportunities don't exist since they all report to the one Associate General Counsel. However, in a larger staff they certainly could. 10

In my experience, the job title has much more to do with the politics of the company and its salary grade/structure than having anything to do with the responsibilities of the lawyer. "Associate General Counsel", "Assistant General Counsel", "Counsel", "Senior Counsel", you name it... the "senior" designation seems to occur most often in companies where the salary grade of the lawyer in question bumps up against job title issues in non-legal areas, i.e. "senior" controls systems engineer, "senior" financial accountant. Your job title itself belies a bit of this: a "senior" vice president is probably an officer under your corporation's bylaws, but a (non-senior) vice president is the head of a department or such but without officer rank/duties/privileges, correct? 11

Response #3

The only specific criteria that we have is at least 8 years of attorney experience. 12

1 Susan Hackett, CEO/CLO, Legal Executive Leadership, LLC (Small Law Departments/Law Department Management, Nov. 6, 2012)
2 Laura Vogel, Assistant General Counsel, The Auto Club Group (Small Law Departments, Nov. 6, 2012)
3 Everett Billingslea, Chief Legal Officer & Senior Vice President, Lynden Incorporated (Small Law Departments, Nov. 6, 2012)
4 P. Bartlett Wu, Attorney (Small Law Departments, Nov. 6, 2012)
5 James Brashear, General Counsel & Corporate Secretary, Zix Corporation (Small Law Departments, Nov. 7, 2012)
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