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# Are Corporate Officers Advised About Fiduciary Duties?

By Lyman Johnson and Dennis Garvis\*

*This Article reports the results of an empirical study of whether and how in-house corporate counsel advise corporate officers about fiduciary duties. The fiduciary duties of officers long have been neglected by courts, scholars, and lawyers, even though executives play a central role in corporate success and failure. The study's findings, organized by type of company (public or private), size, and attorney position, show several interesting patterns in advice-giving practices. For example, fewer than half of all respondents provided advice to officers below the senior-most rank. The results raise the possibility that, unlike directors who may overestimate their liability exposure, certain shortcomings in giving advice to officers may cause them to underestimate personal liability exposure and engage in more risky behavior than is desirable for the company itself. The Article also offers recommendations for improved practices in advising officers about their duties.*

## I. INTRODUCTION—CORPORATE LAW'S NEGLECT OF OFFICERS

Corporate law's treatment of officers is like the weather: everybody talks about it but nobody does anything about it. Undeniably, corporate executives wield great power and are critical to company success,<sup>1</sup> and they generally play central roles in corporate failure and scandal as well.<sup>2</sup> The recent spate of financial traumas—much like the Enron, Tyco, and WorldCom scandals of a few years

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1. See, e.g., JEFFREY SONNENFELD, *THE HERO'S FAREWELL* 39–57 (1988) (proposing that corporate leaders should be seen as folk heroes).

2. See, e.g., *Scandal Scorecard*, *WALL ST. J.*, Oct. 3, 2003, at B1 (detailing criminal charges and investigations against corporate officers).

ago—bear this out. Some companies are successfully navigating the current hard times while others are struggling or collapsing.<sup>3</sup> Often, the quality of top management is a decisive factor in the outcome.<sup>4</sup> Newspapers and other media reflect society's fascination with high-profile executives, providing extensive coverage of their achievements, derelictions, forecasts, earnings (including outsize bonuses and severance packages), and overall lifestyles.<sup>5</sup> In short, executives occupy recognized positions of immense economic and social influence, and their behavior draws widespread attention in the larger cultural arena.

For all their undoubted significance, however, corporate officers receive scant attention in the world of corporate law. This Article examines the practices of inside corporate counsel in advising corporate officers. Specifically, it reports the results of a study, undertaken with the assistance of the Association of Corporate Counsel, designed to see whether and how in-house lawyers advise corporate officers as to their fiduciary duties. Before describing the methodology, results, and implications of the study, however, and in order to better appreciate the larger significance of counsel's advice-giving conduct for improved corporate governance, we place our subject in a larger context. We do so by briefly noting in this introduction the way in which other key institutional actors in the world of corporate law have chronically neglected the topic of corporate officers.

Corporate statutes typically say relatively little about officers, in contrast to the numerous provisions addressing directors and shareholders.<sup>6</sup> Caselaw on the fiduciary duties of officers also is surprisingly sparse,<sup>7</sup> especially in comparison to the surfeit of decisions involving director duties. Important doctrinal questions

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3. The bankruptcy of Lehman Brothers, the venerable investment bank, is the most striking business failure of the autumn 2008 financial meltdown. See *New York Times*, Business, Companies, Lehman Brothers Holdings Inc., [http://topics.nytimes.com/topics/news/business/companies/lehman\\_brothers\\_holdings\\_inc/](http://topics.nytimes.com/topics/news/business/companies/lehman_brothers_holdings_inc/) (last visited June 15, 2009). Other seemingly solid companies—e.g., Merrill Lynch and Wachovia Bank, N.A.—although struggling throughout 2008, sought merger partners to avert disaster. See, e.g., *Bank of America to Buy Merrill*, WALL ST. J., Sept. 15, 2008, <http://online.wsj.com/article/SB122142278543033525.html>; Robin Sidel, David Enrich & Dan Fitzpatrick, *Troubled Wachovia Seeks Out a Merger*, WALL ST. J., Sept. 27, 2008, <http://online.wsj.com/article/SB122246312342980035.html>.

4. See, e.g., Susanne Craig, Jeffrey McCracken, Aaron Luchetti & Kate Kelly, *The Weekend Wall Street Died—Ties that Long United Strongest Firms Unraveled as Lehman Sank Toward Failure*, WALL ST. J., Dec. 29, 2008, at A1 (comparing actions of Richard Fuld, Jr., of Lehman Brothers to actions of leaders at other banks).

5. See, e.g., Erin White, *Best CEOs: The Winners*, WALL ST. J., Dec. 19, 2008, <http://online.wsj.com/article/SB122971949750122237.html>; *CEOs of Bailed-Out Banks Flew to Resorts on Firms' Jets*, WALL ST. J., June 19, 2009, <http://online.wsj.com/article/SB124536271699529031.html>.

6. Delaware's corporate statute contains few provisions pertaining to corporate officers, see, e.g., DEL. CODE ANN. tit. 8, §§ 142–145 (2001), but numerous provisions referring to directors or stockholders. See, e.g., DEL. CODE ANN. tit. 8, §§ 141, 152–155, 157, 161, 170, 251 (2001 & Supp. 2007) (directors); *id.* §§ 211–233 (stockholders). The Model Business Corporation Act contains more sections explicitly addressing officers than Delaware's statute, see, e.g., MODEL BUS. CORP. ACT ANN. §§ 8.40–8.44 (2005)—including a section specifying a standard of conduct, *id.* § 8.42—but far fewer sections focusing on officers than on directors or shareholders. Moreover, some Model Act states, such as Virginia, have deleted the standard of conduct provision for officers from their corporate statutes while still providing a standard for directors. See, e.g., VA. CODE ANN. § 13.1-690 (West 2007).

7. See Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1600–01, 1609–10 (2005).

have remained unanswered for a remarkably long time, even in the leading corporate law state of Delaware, and notwithstanding that fiduciary duties are a vital component of effective corporate governance. For example, does the business judgment rule apply to corporate officers?<sup>8</sup> What exactly are the contours of an officer's duty of care and duty of good faith?<sup>9</sup> What is the standard of care applicable to corporate officers, the usual ordinary care standard of agents or the more lax gross negligence standard applicable to directors?<sup>10</sup> If officers are agents of the corporation, do they owe fiduciary duties to shareholders or only to the company itself? May officers consider the interests of non-shareholder constituencies in the same manner and degree as directors?<sup>11</sup>

Some light was shed on these issues by the January 27, 2009, decision of the Delaware Supreme Court in *Gantler v. Stephens*.<sup>12</sup> There the court noted that it was a matter of first impression whether officers owe fiduciary duties identical to those of directors.<sup>13</sup> Stating that it had earlier "implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors . . . [the court stated we] now explicitly so hold."<sup>14</sup>

Strikingly, the court did not mention the business judgment rule in its analysis of claims against the officers, although it did so with respect to claims against the directors.<sup>15</sup> For the latter, the court applied the usual analytical framework of requiring the plaintiffs' claims to overcome the presumptions of the business

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8. Compare Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 Bus. Law. 439 (2005) [hereinafter Johnson, *Business Judgment Rule*], with Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 Bus. Law. 865 (2005); see also Gregory Scott Crespi, *Should the Business Judgment Rule Apply to Corporate Officers, and Does It Matter?*, 31 OKLA. CITY U. L. REV. 237 (2006).

9. There is little caselaw describing the scope of an officer's duty of care or contrasting the duty from that of a director. See Johnson & Millon, *supra* note 7, at 1600–01. The liability stakes are large because officers, unlike directors, may not be exculpated from personal liability for breaching the duty of care under Delaware law and the law of most other states. See, e.g., DEL. CODE ANN. tit. 8, § 102(b) (7) (2001) (permitting exculpation from liability for breaches of the duty of care by directors but not officers). See also McPadden v. Sidhu, 964 A.2d 1262, 1277 (Del. Ch. 2008) (dismissing case against directors, but not officer, in duty of care case). As to good faith, in November 2006 the Delaware Supreme Court clarified that good faith is not an independent fiduciary duty but is a subsidiary element of the duty of loyalty. See *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006). The court also stated that the fiduciary duty of loyalty is not limited to cases involving conflicts of interest. See *id.* These developments on good faith in the director context raise the important question of whether they will carry over to the fiduciary duties of corporate officers in the same way. See *In re World Health Alternatives, Inc.*, 385 B.R. 576, 591–94 (Bankr. D. Del. 2008) (addressing oversight responsibilities of officers).

10. See Johnson & Millon, *supra* note 7, at 1636–39.

11. Compare *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955–56 (Del. 1985) (stating that directors may consider non-shareholder interests in implementing defensive measures), with *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 181 (Del. 1985) (holding that directors must exclusively advance shareholder interests in sale of control or break-up context).

12. 965 A.2d 695 (Del. 2009).

13. *Id.* at 708.

14. *Id.* at 708–09.

15. *Id.* at 705–06.

judgment rule (which they did).<sup>16</sup> For claims against the officers, however, the court took a different approach, finding that the allegations “state a claim that they breached their fiduciary duties as officers.”<sup>17</sup>

Thus, whether and how the business judgment rule applies to officers in Delaware remains unclear. Moreover, the court in *Gantler* addressed the duty of loyalty issue, not the duty of care issue. Also, the case did not involve officer oversight responsibilities. Thus, we continue to lack clear guidance as to the scope and reach of officer duties of care and good faith. Relatedly, the Delaware Supreme Court also did not address the ordinary negligence versus gross negligence standard in the care context, as the issue was not before it. Finally, given rather significant differences in the roles and responsibilities of directors and officers within corporate governance, the court did not explain the reason for equating their fiduciary duties.<sup>18</sup> Clearly, the area of officer duties remains murkier than that of director duties.

Besides being neglected by legislators and judges, other influential actors also pay little heed to corporate officers. In law schools, the key training ground for lawyers, most casebooks accord only cursory attention to the fiduciary duties of executives, often lumping them with the more extensively covered duties of directors, if they are treated at all.<sup>19</sup> The same is true of corporate law treatises,<sup>20</sup> along with the many institutes, conferences, and professional meetings designed for the practicing lawyer.<sup>21</sup> Corporate law scholarship also has largely neglected the role of officers in corporate governance—preferring to focus on directors and shareholders<sup>22</sup>—with the result that the position of officers in corporate affairs remains under-theorized.<sup>23</sup> Officers often are regarded as representing an

16. *Id.* at 708.

17. *Id.* at 709.

18. Officers, of course, are agents of the corporation, unlike directors. See Johnson & Millon, *supra* note 7, at 1605–08. The usual standard of care for an agent is a standard of ordinary care or simple negligence, not the standard of gross negligence long applied in Delaware to directors. See *id.* at 1631. It is worth remembering, in the officer context, the insightful observation of Justice Frankfurter:

But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1943). These are highly pertinent questions yet to be authoritatively resolved with respect to corporate officers.

19. This remains true of most U.S. law school casebooks as of early 2009. See Lyman Johnson, *Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (and Other Senior Agents)*, 63 *BUS. LAW.* 147, 148 n.7 (2007) [hereinafter Johnson, *Having the Fiduciary Duty Talk*].

20. See Johnson & Millon, *supra* note 7, at 1600 & n.10, 1609–10.

21. See Johnson, *Having the Fiduciary Duty Talk*, *supra* note 19, at 148 & n.7.

22. See Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 *U. CHI. L. REV.* 487, 516 (2007) (noting that legal literature has “given a narrow definition” to “corporate governance,” a broad concept).

23. The body of scholarship devoted to addressing issues associated with corporate officers is growing but remains small. Besides Johnson & Millon, *supra* note 7, see Z. Jill Barclift, *Fuzzy Logic and Corporate Governance Theories*, 6 *PIERCE L. REV.* 177 (2007); Crespi, *supra* note 8; Hamermesh & Sparks, *supra* note 8; David A. Hoffman, *Self-Handicapping and Managers' Duty of Care*, 42 *WAKE FOREST L. REV.* 803, 807–12 (2007); Johnson, *Corporate Officers and the Business Judgment Rule*, *supra* note 8; Johnson, *Having the Fiduciary Duty Talk*, *supra* note 19; Aaron D. Jones, *Corporate Officer Wrongdoing and the*

“agency problem” to be solved by corporate governance,<sup>24</sup> rather than being conceived as part of healthy governance. The very executives so central to the world of business remain conspicuous by their absence in the domain of corporate law.

Compounding the lack of legal materials—or perhaps the cause of it—lawyers themselves appear not to focus sharply on the discrete fiduciary position (and resulting responsibilities and liability exposure) of the corporate officer. This professional neglect is true of the plaintiff’s bar, as nicely illustrated by the highest profile corporate law case in recent years, the *Disney* litigation involving controversial severance payments made to former President Michael Ovitz.<sup>25</sup> Promisingly, experienced plaintiffs’ counsel sued General Counsel Sanford Litvack and CEO Michael Eisner in their capacities as directors *and* as officers.<sup>26</sup> Yet, as noted by Chancellor William Chandler in his post-trial opinion, the legal nature of the fiduciary duty claims pressed at trial by the plaintiffs against Litvack and Eisner as officers was essentially the same as the claims made against them as directors.<sup>27</sup> Only on appeal did counsel change course, arguing for a stricter standard,<sup>28</sup> but by then, the Delaware Supreme Court chided that it was too late.<sup>29</sup>

But what about the corporate bar, those sophisticated business lawyers who work exclusively on corporate matters; do these lawyers separately attend to the fiduciary duties of corporate officers? A pilot study of *outside* counsel suggested lawyers do not routinely advise executives as to their fiduciary duties,<sup>30</sup> thereby reinforcing the story that corporate law and legal actors largely neglect officers. The current Article extends the investigation by reporting on the results of an em-

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*Fiduciary Duties of Corporate Officers Under Delaware Law*, 44 AM. BUS. L.J. 475 (2007); Douglas C. Michael, *The Corporate Officer’s Independent Duty as a Tonic for the Anemic Law of Executive Compensation*, 17 J. CORP. L. 785 (1992); Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 FLA. L. REV. 1 (2009).

24. For a succinct description of how corporate law seeks to mitigate what organizational theorists describe as the managerial “agency problem” through various governance mechanisms, see Sanjai Bhagat, Brian Bolton & Roberta Romano, *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803, 1809–14 (2008).

25. See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005), *aff’d*, 906 A.2d 27 (Del. 2006).

26. See *Disney*, 907 A.2d at 695. The plaintiffs were represented by the sophisticated and deeply experienced law firms of Rosenthal, Monhait, Gross & Goddess, P.A., and Milberg Weiss Bershad Hynes & Lerach LLP. See *id.*

27. *Id.* at 777 n.588 (“The parties essentially treat both officers and directors as comparable fiduciaries, that is, subject to the same fiduciary duties and standards of substantive review. Thus, for purposes of this case, theories of liability against corporate directors apply equally to corporate officers, making further distinctions unnecessary.”).

28. See Appellants’ Opening Brief at 36, *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006), (No. 411, 2005), available at <http://entrepreneur.typepad.com/conglomerate/disney/Appellants1.pdf> (“[T]he business judgment rule does not apply to Eisner or Litvack acting as officers or to Russell acting as Eisner’s personal ‘gratuitous agent.’”).

29. See *Disney*, 906 A.2d at 46 n.38.

30. Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 669–78 (2007).

pirical study of *inside* corporate counsel's advice-giving practices. This study was pointedly designed to see whether in-house lawyers—unlike many legislators, judges, law professors, plaintiffs' lawyers, and outside counsel—explicitly attend to the subject of officer fiduciary duties.<sup>31</sup> Doing so in an *ex ante* advice-giving capacity is especially important if fiduciary duties are actually to influence officer conduct in a meaningful way,<sup>32</sup> as opposed to serving only as an *ex post* sanctioning and risk-allocation device in litigation.<sup>33</sup> Moreover, inside counsel are especially well-situated to advise officers—and possibly help curb harmful conduct—given that they work in close contact with business executives on a recurring basis.<sup>34</sup>

Part II of this Article describes the study's methodology and results, some of which were surprising. For the most part, corporate counsel—especially general counsel—appear to be the group of legal actors most attuned to the subject of officer fiduciary duties. There is a fair bit of variation in advice-giving practices when assorted organizational characteristics are considered, however, and there are some notable gaps in coverage. Part III offers an analysis of what we consider to be the implications of our findings and includes some recommendations. Overall, officers appear to be somewhat under-advised about fiduciary duties—and about their own personal liability exposure—in a way that may enhance risk-taking on their part, at least to the extent liability rules shape conduct.<sup>35</sup> This stands in contrast to outside directors who, in being frequently told about their duties and liability exposure by lawyers, the trade press, and directors' and officers' ("D&O") liability insurers, may overestimate their risk of actual liability in a way that leads to risk aversion.<sup>36</sup> In other words, directors and officers each may misunderstand risk but in opposite ways. Part IV provides a brief conclusion.

31. As aptly noted by Professor Tanina Rostain, "[W]e have a limited understanding of the place of general counsel, and more generally the legal department, inside the corporation." Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 *GEO. J. LEGAL ETHICS* 465, 466 (2008).

32. A somewhat parallel argument in the public arena has been made by President Obama's recent appointee to head the Office of Legal Counsel in the U.S. Department of Justice—Dawn Johnsen—who argues that legal advisors within the executive branch of the federal government can serve as an underappreciated source of constraint on executive power. See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1564–65 (2007).

33. See Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 *NOTRE DAME L. REV.* 75, 81–82, 87–92 (2008) (describing fiduciary duty litigation).

34. This aspect of corporate counsel's position within a company has been noted by several general counsel. See Rostain, *supra* note 31, at 471. For a helpful explanation of the many functions carried out by general counsel, and an argument that general counsel are well situated to promote corporate integrity, see Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 *ST. LOUIS U. L.J.* 989 (2007).

35. A chief goal of liability rules in corporate law is to deter wrongdoing by directors and officers. See Reinier Kraakman, Hyun Park & Steven Shavell, *When Are Shareholder Suits in Shareholder Interests?*, 82 *GEO. L.J.* 1733, 1738 (1994).

36. See Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 *STAN. L. REV.* 1055, 1110–12 (2006) (noting that outside directors rarely incur personal liability for fiduciary duty breaches due to indemnification, exculpation, and D&O insurance).



## II. METHODOLOGY AND RESULTS

### A. APPROACH AND FINDINGS

This section describes the survey methodology used to investigate the advice given to corporate executives by inside legal counsel. It also summarizes our findings. Extending prior research examining the advice-giving practices of outside counsel,<sup>37</sup> a new survey was developed to gather information regarding practices of in-house counsel in giving fiduciary duty advice to corporate officers. The survey instrument also sought information about pertinent characteristics of the respondents' employer companies so that responses could be analyzed for possible linkages between the advice given and type of organization. This survey was pilot tested with current and former inside counsel. The final version of the survey (Appendix A to this Article) was developed using feedback from this pilot testing.

The target population for this study was in-house corporate counsel. The Association of Corporate Counsel ("ACC"), a professional membership organization of corporate counsel, agreed to support this study as part of its mission of providing services and professional support for its members. Conducted in fall 2007, the ACC issued both online<sup>38</sup> and newsletter<sup>39</sup> invitations to its members to participate in the study. Data from counsel was collected by means of an online survey,<sup>40</sup> using a web-based service that provided applications to create and format the survey, collect data from respondents, and summarize the results.<sup>41</sup> As a result of these activities, sixty-six responses from in-house corporate counsel were received, out of which sixty-four usable surveys were completed.

Of the sixty-four usable responses, twenty-six were received from counsel at publicly held companies, twenty-seven from private companies and partnerships, nine from non-profit organizations, and two from "other" corporate entities. As a

37. See Johnson & Ricca, *supra* note 30.

38. The series of web site announcements included an initial notice of the study featured on the ACC homepage, a highlighted item in the ACC News section, and a reminder notice. The online invitation included in each posting was prepared as a means of generating interest from a wide variety of in-house counsel. The announcement stated:

Be a participant in a project which seeks to gather information on whether in-house counsel are advising their corporate officers as to their fiduciary duties. This survey, which focuses on the interaction between corporate officers and legal counsel, addresses a serious gap in our understanding about the delivery of legal advice to business managers.

The announcement was first available on September 17, 2007, at [www.acc.com/feature.php?fid=1275](http://www.acc.com/feature.php?fid=1275). It is no longer available. Each web posting also contained a link to the online survey.

39. The newsletter stated:

A new project, which seeks to gather information on whether in-house counsel are advising their corporate officers on their fiduciary duties, is underway and you are invited to participate. This survey focuses on the interaction between corporate officers and legal counsel, and will address the significant gap in our understanding about the delivery of legal advice to business managers.

Association of Corporate Counsel, ACC . . . Your Monthly Member Update, Survey: Are You Providing Adequate Fiduciary Duty Advice (Oct. 12, 2007), <http://news.acca.com/accammu/issues/2007-10-12.html>; Association of Corporate Counsel, ACC Committee News, Are You Giving Enough Fiduciary Duty Advice? (Sept. 26, 2007), <http://news.acca.com/accacomm/issues/2007-09-26.html>. The newsletter postings also contained the link to the online survey.

40. Counsel were promised confidentiality, as reflected in the survey attached as Appendix A.

41. See Survey Monkey, [www.surveymonkey.com](http://www.surveymonkey.com) (last visited June 15, 2009).

means of controlling for organization size, respondents were asked to self-report annual revenues in four categories. Responses were received from thirty-three counsel in companies with annual revenues of less than \$500 million, twelve from companies in the range of \$500 million to \$2 billion, nine in the range of \$2 billion to \$10 billion, and nine from companies with annual revenues greater than \$10 billion.<sup>42</sup> In examining organizational roles, usable responses were received from forty-two general counsel/chief legal officers and twenty-two counsel holding other positions in their organizations (e.g., associate general counsel, deputy general counsel, division counsel, senior attorney).

The substantive questions in the survey sought to investigate the practices of counsel in giving fiduciary duty advice. In the first substantive question (Question 7 in Appendix A), respondents were asked if they provide general fiduciary advice to senior corporate officers (e.g., CEO, CFO) in their capacity as corporate officers. As seen from the survey instrument, the question states explicitly that we were not asking whether counsel advises senior officers in their capacity as directors—a position many such executives also occupy—but sought to know only about advice provided to officers *as* officers. In the second set of substantive questions (Question 8 in Appendix A), respondents were specifically asked whether they advised officers as to the duty of loyalty and as to the duty of care, the two pillars of fiduciary duty. They were also asked to identify the various settings in which fiduciary duty advice was given.

The third set of questions (Questions 9 and 10 in Appendix A) asked whether counsel provided fiduciary advice to corporate directors as well as to corporate officers and, if so, whether such advice was the same or different between the two groups. Last, respondents were asked (Question 11 in Appendix A) whether they provided fiduciary duty advice to officers other than senior officers, such as to business unit or division managers or to officers of subsidiaries. They were also asked (Question 12) about their attendance at any professional meetings where practices for advising officers about fiduciary duties were discussed. Summary results of responses to these several sets of questions are reported in Tables 1, 2, and 3 below.<sup>43</sup>

The results of the survey show several interesting patterns in the responses from this sample of corporate counsel. With respect to the first substantive survey question, more than two-thirds (67.2 percent, Column A of Table 1) of all responding counsel indicated that they provide general fiduciary duty advice to senior executives. This is a far higher percentage than the percentage of outside counsel who do so.<sup>44</sup> Nonetheless, this means one out of three respondents offers no such advice. Moreover, the level of advice-giving drops noticeably with respect to providing guidance about the specific duties of care and loyalty, with 56.3 percent (Column B of Table 1) of respondents indicating they advise senior

42. One respondent did not report annual revenues.

43. Information on the various settings where counsel gives advice to officers is not summarized in the tables but is described in the text. See *infra* Part II.

44. See Johnson & Ricca, *supra* note 30, at 670–71.

executives on the duty of loyalty and 59.5 percent (Column C of Table 1) providing advice on the duty of care. That advice-giving on the duty of care is no lower—indeed it is slightly higher—than advice-giving on the duty of loyalty is striking given that the duty of loyalty is often thought to comprise the essential “core” of fiduciary duty and, generally, receives more attention than care, at least for corporate directors.<sup>45</sup>

As seen in the body of Table 1, this consistent drop-off in the giving of advice on the specific duties of loyalty and care is seen in almost every category by which respondents are sorted along the lines of organizational characteristics (i.e., corporate status, firm size, and attorney position in organization). Thus, there are discernible differences in the practices of corporate counsel in this sample in giving advice on the duties of care and loyalty, with more than 40 percent of respondents not specifically advising officers about these key duties.

As to those settings where corporate counsel provides advice to senior executives, 77.5 percent of respondents do so in connection with compliance/risk management and 70 percent do so in transactional contexts. Advice is provided in litigation by 50 percent of respondents and in conjunction with employee relations by 32.5 percent. Interestingly, advice in connection with executive compensation is provided by 32.5 percent of respondents, seemingly a low number, but that may reflect counsel’s view that they represent the company, not executives, in that setting. Of course, legal advice could be offered to a senior executive in his or her capacity as a representative of the company in dealing with lower-level executive compensation issues.

Another pattern in the responses to the first and second sets of questions becomes evident when responses are categorized by organizational characteristics, as seen in Table 1. In comparison to the frequency of responses for the entire sample, corporate counsel in publicly held companies indicated lower rates of giving senior executives advice about general fiduciary duties (57.7 percent), the duty of loyalty (46.2 percent), and the duty of care (46.2 percent). In contrast, higher levels of advice-giving on all of these matters were reported by counsel at private companies and in partnerships, non-profit organizations, and other organizations.

Noticeable patterns are also seen when examining responses on the basis of organization size as measured by annual revenues. Respondents in organizations in the two smaller categories (less than \$500 million in revenue and between \$500 million and \$2 billion) reported much higher levels of giving fiduciary advice to senior executives than corporate counsel in the larger two categories (between \$2 billion and \$10 billion and greater than \$10 billion), although the sample size in

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45. One reason caselaw more frequently focuses on loyalty claims is that directors typically are exculpated from liability for care breaches but not from liability for loyalty breaches. See *supra* note 9. As stated by the *Corporate Director’s Guidebook*, the duty of loyalty broadly requires a director’s conduct to be “in the best interests of the corporation . . . [and] there is a variety of situations in which a director’s loyalty can be questioned.” COMM. ON CORP. LAWS, SECTION OF BUS. LAW, AM. BAR ASS’N, *CORPORATE DIRECTOR’S GUIDEBOOK* (5th ed. 2007), reprinted in 62 BUS. LAW. 1479, 1497 (2007).

Table 1

	Do you advise senior corporate officers as to:		
	A. General Fiduciary Duty*	B. Duty of Loyalty*	C. Duty of Care*
<b>All Respondents (n = 64)</b>	67.2% (43/64)	56.3% (36/64)	59.5% (38/64)
<b>Corporate Status</b>			
Public Companies (n = 26)	57.7% (15/26)	46.2% (12/26)	46.2% (12/26)
Private Companies and Partnerships (n = 27)	66.7% (18/27)	63.0% (17/27)	63.0% (17/27)
Non-Profit Organizations (n = 9)	88.9% (8/9)	66.7% (6/9)	88.9% (8/9)
Other Organizations (n = 2)	100% (2/2)	50.0% (1/2)	50.0% (1/2)
<b>Firm Size (US\$ annual revenues)</b>			
Less than \$500 million (n = 33)	75.8% (25/33)	63.6% (21/33)	72.9% (24/33)
From \$500 million to \$2 billion (n = 12)	83.3% (10/12)	75.0% (9/12)	66.7% (8/12)
From \$2 billion to \$10 billion (n = 9)	33.3% (3/9)	22.2% (2/9)	22.2% (2/9)
Greater than \$10 billion (n = 9)	44.4% (4/9)	44.4% (4/9)	33.3% (3/9)
(one respondent did not report size)			
<b>Position in Organization</b>			
General Counsel and Chief Legal Officer (n = 42)	81.0% (34/42)	69.0% (29/42)	73.8% (31/42)
All Other Counsel (n = 22)	40.9% (9/22)	31.8% (7/22)	31.8% (7/22)

\*Frequency responding affirmatively

each of the latter two categories is somewhat small. This finding may confirm the earlier finding that higher levels of advice are given by counsel of private companies, given that those companies are more likely (though not necessarily) to have lower annual revenues. Finally, when responses to the first set of substantive survey questions are examined based on organizational position, general counsel and chief legal officers reported higher levels of giving fiduciary advice to senior officers than the overall sample—81 percent as compared to 67.2 percent—though these lawyers too, as noted above, tail off a bit in advising about loyalty (69 percent) and care (73.8 percent) specifically. Overall, the practices of corporate counsel in giving fiduciary duty advice to senior executives show marked differences when organizational characteristics are considered.

The third set of survey questions focused on identifying whether respondents advised directors as well as senior officers and, for those who do, on comparing the fiduciary duty advice given to senior executives with that given to corporate directors. In comparing Column A of Table 2 to Column A of Table 1, respondents indicate that they provide fiduciary duty advice to both senior executives and corporate directors at roughly the same rates as such advice is provided to senior executives. The noteworthy results in Table 2 are seen in Columns B and C, which report whether our sample of inside counsel is providing the same or different advice to executives and directors. Of the forty respondents who indicated that they advise both executives and directors, twenty-seven (67.5 percent) reported that they gave the same advice to both groups. Similarly, when the findings are categorized by organizational characteristics (where there were sufficient responses), the majority of respondents in all categories reported that they are providing the same advice to executives and directors.

General counsel and chief legal officers responded that they advised both senior officers and directors at a significantly higher rate (76.2 percent) than did counsel occupying other positions (36.4 percent), an unsurprising finding given the greater likelihood that the former will interact with directors. Overall, what is noticeable with respect to this third set of results is that although there are many corporate counsel (especially general counsel and chief legal officers) providing advice to both executives and directors, there is a conspicuous segment (even among general counsel and chief legal officers) that is not providing that advice to both groups. Also striking, given the continued legal uncertainty on certain key issues associated with officer fiduciary duties<sup>46</sup>—issues that are more clearly settled for directors—is that the majority of respondents provide the same advice to both groups. One possible explanation for this pattern is that counsel may provide fiduciary duty advice at board meetings where both directors and certain senior executives are present. A significant minority of respondents, however, provide different advice to the two groups of corporate officials. The survey instrument was not specifically designed to ascertain exactly how the advice differed. Respondents were given an open-ended opportunity to comment further, however.

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46. See *supra* notes 8–11 and accompanying text.

Table 2

	A. Do you advise directors as well as senior corporate officers as to fiduciary duty?*	If your answer is yes, do you provide the same or different advice?	
		B. Same	C. Different
<b>All Respondents (n = 64)</b>	62.5% (40/64)	67.5% (27/40)	32.5% (13/40)
<b>Corporate Status</b>			
Public Companies (n = 26)	61.5% (16/26)	75.0% (12/16)	25.0% (4/16)
Private Companies and Partnerships (n = 27)	55.6% (15/27)	73.3% (11/15)	26.7% (4/15)
Non-Profit Organizations (n = 9)	88.9% (8/9)	50.0% (4/8)	50.0% (4/8)
Other Organizations (n = 2)	50.0% (1/2)	0.0% (0/1)	100% (1/1)
<b>Firm Size (US\$ annual revenues)</b>			
Less than \$500 million (n = 33)	69.7% (23/33)	69.6% (16/23)	30.4% (7/23)
From \$500 million to \$2 billion (n = 12)	75.0% (9/12)	77.8% (7/9)	22.2% (2/9)
From \$2 billion to \$10 billion (n = 9)	33.3% (3/9)	66.6% (2/3)	33.3% (1/3)
Greater than \$10 billion (n = 9) (one respondent did not report size)	44.4% (4/9)	25.0% (1/4)	75.0% (3/4)
<b>Position in Organization</b>			
General Counsel and Chief Legal Officer (n = 42)	76.2% (32/42)	71.2% (23/32)	28.1% (9/32)
All Other Counsel (n = 22)	36.4% (8/22)	50.0% (4/8)	50.0% (4/8)

\*Frequency responding affirmatively

One comment, for example, noted that directors may reasonably rely on advisors while officers, with their constructive knowledge of the corporation, must perform greater due diligence before making key decisions. Another comment noted that new directors received more specific orientation.<sup>47</sup>

As to the last set of questions, Table 3 reveals that, overall, fewer than half of all respondents provide fiduciary duty advice to managers or officers “deeper” in the organization, such as division managers or officers of subsidiaries. Here too, counsel in private companies provide such advice at a higher level than do counsel in public companies. General counsel and chief legal officers do not advise subordinate officers more frequently than do other in-house counsel.

Table 3 also reveals that, overall, only about one-third of respondents have attended a conference or professional meeting where the subject of legal counsel advising corporate officers about fiduciary duties was discussed. That the figure was even that high is somewhat surprising given the dearth of written materials or professional meetings that address this subject. Even so, the vast majority of counsel report that they have not attended such meetings, suggesting little professional attention is being given to the topic. This stands in stark contrast to the longstanding and extensive attention lavished on the fiduciary duties of corporate directors.<sup>48</sup>

## B. EMPIRICAL LIMITATIONS

As in any empirical research, the results of our study are limited by certain factors. The most noticeable limitation is derived from the number of survey respondents in the study. No inferential techniques were applied in our analysis due to the sample size. Accordingly, the percentage of sampled counsel who responded that they are providing fiduciary duty advice to executives cannot be generalized to the entire population of corporate counsel. While simple descriptive analysis is appropriate in this early stage of research, this limitation would be resolved by generating larger samples in future research. Indeed, generating a large sample would also permit testing whether the patterns of differences in responses from various categories of counsel is statistically significant. Another limitation of the study is the possible introduction of non-response bias arising from counsel who chose not to participate in the study. Such counsel may hold different views and employ different practices regarding the giving of fiduciary advice to executives than counsel who did respond. This potential bias resulting from the lack of input from non-respondents is difficult to overcome. It can be minimized, again, with larger representative samples. Finally, our data reflects self-reported information from a single source within organizations. Accordingly, there is a possibility that responses do not reflect actual practices in those organizations. While we did promise anonymity to all potential respondents as a means of addressing this

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47. All of the open-ended comments are on file with *The Business Lawyer*.

48. See Johnson, *Having the Fiduciary Duty Talk*, *supra* note 19, at 147–48.

Table 3

	A. Do you or any other attorneys within your organization provide fiduciary duty advice to officers <i>other than</i> senior officers (e.g., to business unit or division managers, or to officers of subsidiaries)?*	B. Have you, within the past 5 years, attended a conference, seminar, or other professional meeting where the subject of legal counsel specifically advising officers (not directors) as to their fiduciary duties was discussed*
<b>All Respondents (n = 64)</b>	46.9% (30/64)	34.4% (22/64)
<b>Corporate Status</b>		
Public Companies (n = 26)	42.3% (11/26)	23.1% (6/26)
Private Companies and Partnerships (n = 27)	55.6% (15/27)	44.4% (12/27)
Non-Profit Organizations (n = 9)	33.3% (3/9)	33.3% (3/9)
Other Organizations (n = 2)	50.0% (1/2)	50.0% (1/2)
<b>Firm Size (US\$ annual revenues)</b>		
Less than \$500 million (n = 33)	51.5% (17/33)	45.4% (15/33)
From \$500 million to \$2 billion (n = 12)	50.0% (6/12)	16.7% (2/12)
From \$2 billion to \$10 billion (n = 9)	55.6% (5/9)	44.4% (4/9)
Greater than \$10 billion (n = 9) (one respondent did not report size)	22.2% (2/9)	11.1% (1/9)
<b>Position in Organization</b>		
General Counsel and Chief Legal Officer (n = 42)	47.6% (20/42)	35.8% (15/42)
All Other Counsel (n = 22)	44.4% (10/22)	31.8% (7/22)

\*Frequency responding affirmatively



limitation, we did not pursue other means of checking the validity of respondent data. In future work, the validity of responses regarding advising practices can be confirmed by seeking responses from those *receiving* advice (executives and directors) as well as those *providing* the advice (counsel).

### III. ANALYSIS

The study's findings shed new light on the advice-giving practices of corporate counsel. The study also rounds out the picture of how important legal actors treat (or neglect) the subject of officer fiduciary duties. For those who view executives as critical actors in corporate governance and who believe fiduciary duties are a vital *ex ante* and *ex post* regulator of officers' conduct, knowing what is—and is not—being done in the way of addressing officer duties is a necessary first step toward improved practices in this area. Several observations flow out of the study.

Overall, corporate counsel appear to advise senior corporate officers about fiduciary duties more pervasively than do outside counsel.<sup>49</sup> Inside counsel are well suited for rendering such advice because they work closely with officers on an ongoing basis in a variety of settings. Professional proximity may afford inside counsel more opportunities for giving such advice and greater ease and comfort in doing so. One respondent emphasized just this factor in stating, "I think that weaving the concepts behind an officer's fiduciary duty into regular work conversations (even if not explicitly referred to as a 'fiduciary duty') can be easily and gently accomplished and is a good reminder." In addition, corporate counsel are often more knowledgeable about company affairs, information networks, and company-specific business norms and protocol than outside counsel. Thus, they are "uniquely positioned to specialize in preventive law."<sup>50</sup>

Outside counsel, especially when retained for high-end transaction work, may serve more as "transactional engineers" than as "wise counselors."<sup>51</sup> Moreover, they may regard their responsibilities as running to the board of directors in such matters or simply not believe it is their role to advise officers about their duties,

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49. See Johnson & Ricca, *supra* note 30, at 670–71 (reporting results of survey of advice-giving practices of outside counsel).

50. JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 195 (2006). Coffee concludes, however, that outside counsel likely can play a more effective gatekeeping role. *Id.* at 195, 230–31. For an argument that inside counsel have great potential to serve as corporate "gatekeepers," see Sung Hui Kim, *Gatekeepers Inside Out*, 21 *GEO. J. LEGAL ETHICS* 411 (2008). See also Rostain, *supra* note 31. In most states, moreover, inside legal counsel are permitted to provide legal services only to the corporate entity, thereby removing a potential conflict of interest as to who exactly is the client. Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 *MINN. L. REV.* 1625, 1650 (2000). For an example of how a lawyer's failure to comply with professional obligations when representing both a company and a senior officer can lead to serious sanctions, see *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009) (referring lawyer to state bar for discipline for breaching the duty of loyalty).

51. See Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 *CONN. L. REV.* 1185, 1208–10 (2003).

at least outside the particular context for which they were retained.<sup>52</sup> Also, inside counsel often are corporate officers themselves. Reflection on the fiduciary responsibilities of their own position may sensitize them to the importance of advising other officers about their duties.

On the other hand, corporate counsel do not appear to do a particularly good job of advising *non-senior* officers. Overall, fewer than half of all respondents offered fiduciary duty advice to officers below the senior-most rank. General counsel did so at no higher level than other legal counsel. This is an area where advice-giving practices should be improved.<sup>53</sup> It hardly needs arguing that executive vice presidents, and the whole gamut of more junior-ranking officers beneath them, have enormous influence over corporate affairs.<sup>54</sup> There are many compelling reasons why corporate officers should be advised about their fiduciary duties<sup>55</sup>—including appropriate sensitivity to possible malpractice claims<sup>56</sup>—and general counsels should consider seeing to it that a greater number of officers receive fiduciary duty advice, both upon being hired and on a regular basis thereafter.

Moreover, even the overall data might be interpreted more critically. Although approximately two-thirds of all respondents do advise senior officers about fiduciary duties, that means one out of three respondents do not offer such advice. Even with respect to general counsel, 20 percent do not advise even senior officers. More than 60 percent of non-general counsel do not render such advice. Furthermore, 40 percent of all respondents—and 30 percent of general counsels—do not specifically advise senior officers about the core duties of loyalty and care. As one respondent noted, “I have never seen any of our executive officers act in a manner that I would consider disloyal or without reasonable care. If I thought they were acting in such a manner, then I would advise them of their fiduciary duties.” Lacking greater detail concerning the content of their fiduciary duties,

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52. A recent example is seen in the advice given by attorney Robert Joffe, a partner at Cravath, Swain & Moore, who regularly advises boards of directors: “What you can tell directors is that if they pay attention to the law and live up to their fiduciary duties of loyalty and care, they personally are not going to be in peril.” Stephanie Francis Ward, *What I Did During the Meltdown: “You Can’t Calm Directors by Telling Them It’s All Going to Be OK,”* 95 A.B.A. J. 50, 50 (2009). Such advice, however useful for directors, is not being conveyed to officers by lawyers such as Mr. Joffe because it is not the role for which they are engaged.

53. Model advice for such officers can be found in Johnson, *Having the Fiduciary Duty Talk*, *supra* note 19, at 154–55.

54. Although Delaware courts tend not to hold directors liable for misconduct engaged in by lower-level employees, they may not so readily absolve corporate officers for similar failures to monitor. See *Guttman v. Huang*, 823 A.2d 492, 507 (Del. Ch. 2003) (stating that directors are not expected to discover accounting irregularities involving corporate conduct “deep below the surface of the financial statements”); *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (noting that “[m]ost of the decisions that a corporation, acting through its human agents, makes are, of course, not the subject of director attention” (quoting *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996)) (alteration in original)).

55. See Johnson & Ricca, *supra* note 30, at 681–91; Johnson, *Having the Fiduciary Duty Talk*, *supra* note 19, at 155–56.

56. Denise Oliveira, *In-House Counsel at Risk for Malpractice Claims*, Law360, Jan. 8, 2009, <http://securities.law360.com/articles/81660> (noting increase in claims asserted against inside counsel in 2008) (subscription service).

however, may make it difficult for officers to self-regulate their conduct to comply with such duties when not being observed by counsel. Thus, even at the level of advising senior officers, there is considerable room for upgrading professional practices in this area.

Another striking finding is that counsel for public companies advise officers at lower rates than counsel for private companies. Theoretically, fiduciary duties are vital as residual protection for investors in public companies due to the difficulty of engaging in detailed bargaining with, and monitoring of, managers.<sup>57</sup> Alternatively, in the private company setting, some theorists contend that robust contracting can supplant, or at least reduce the significance of, default fiduciary duties as a mechanism of investor protection.<sup>58</sup>

Whatever the theoretical debates, corporate counsel for private companies appear to display greater, not lesser, attentiveness to fiduciary duties than counsel for public companies. Possibly in the private company setting legal counsel have longer-standing relationships with officers, and also have more frequent and closer contact with officers, each of which facilitates conversations about fiduciary duties in a more natural, less stilted fashion.

Also, in a private company counsel may believe that they represent both the corporation itself and its senior officers. Although some commentators criticize in-house counsel for wrongly equating the interests of management with those of the company,<sup>59</sup> reminding officers of their fiduciary duties can serve the interests of both the company and the officer who owes the duty, and can serve to mitigate conflicts of interest. We do not know whether that explanation accounts for the observed difference in advice-giving rates but it is certainly plausible. Whatever the reason, counsel for public companies lag behind their private company counterparts in advising officers about their fiduciary duties.

The study also reveals that two-thirds of those who advise both executives and directors provide the same advice to both groups.<sup>60</sup> This practice is understandable given that courts, law school casebooks, and most legal materials tend to lump together the duties of officers and directors.<sup>61</sup> At the same time, as noted before,<sup>62</sup> there is both greater uncertainty about the scope of legal duties for

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57. See Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 700–03 (1982) (explaining divergent interests of corporate principals and agents, and how fiduciary duty rules work to reduce this problem).

58. For a description of this view with the argument that shareholders would plan better with a “paternalistic nudge” from legislators, see Judd F. Sneirson, *Soft Paternalism for Close Corporations: Helping Shareholders Help Themselves*, 2008 WIS. L. REV. 899, 914–18. Delaware permits contracting around, or opting out of altogether, fiduciary duties in unincorporated business entities, see, e.g., DEL. CODE ANN. tit. 6, § 17-1101(d) (2007), but does not permit that with respect to director loyalty in the corporation. See *supra* note 9.

59. William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 64 (2003).

60. The study also revealed, surprisingly, that about one out of four general counsel do not advise both officers and directors. We do not know which group the various respondents do not advise or why.

61. See *supra* notes 19–21 and accompanying text.

62. See *supra* notes 8–11 and accompanying text.

officers than for directors, and officers may face significantly greater risk of personal liability exposure.<sup>63</sup> Moreover, officers are full-time employees and, unlike individual directors, are agents of the company with broad authority,<sup>64</sup> thus having greater opportunity to help or harm the company than directors. Tailoring advice to officers as officers, therefore, seems especially important.

Even if corporate counsel believe that they represent the company, not the officers, it is in the company's best interests to have its most influential actors clearly understand their fiduciary obligations.<sup>65</sup> We do not really know, of course, how being clearly and authoritatively advised about their fiduciary duties would, if at all, influence their conduct. Professor Donald Langevoort has noted that executives who make it to the top have strong, domineering personalities and a "deep capacity for ethical self-deception."<sup>66</sup> Perhaps they would be unaffected by advice reminding them of those legal duties that countermand the pursuit of self-interest. On the other hand, Professors Black, Cheffins, and Klausner have found that directors, who are frequently advised about potential personal liability by lawyers, do respond to such advice and may overestimate their actual exposure in a way that skews their incentives toward risk aversion.<sup>67</sup> In other words, legal advice affects director conduct.

The factors shaping officer incentives likely differ from those of directors,<sup>68</sup> but it is still possible that *not* being advised about fiduciary duties—and about the attendant potentially higher liability risk they face than directors<sup>69</sup>—may lead

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63. The risk of actually paying out-of-pocket damages will depend on the nature and extent of the D&O insurance policy coverage, but reputational harm, lost time, and aggravation will be incurred. See Black, Cheffins & Klausner, *supra* note 36, at 1056. See also Seymour Roberts, Jr., *Director and Officer Insurance Policies and Proceeds*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 231 (William N. Norton, Jr. ed., 2008).

64. See Johnson & Millon, *supra* note 7, at 1607. The court in the recent *Gantler* decision stated that officers owe the same duties as directors, see *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009), but, as noted earlier, several questions about officer duties nonetheless remain. See *supra* notes 8–11 and accompanying text. Also, as officers of the company, chief legal officers themselves are agents whose conduct can create liability for the corporation. See Grace Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 N.E. L. REV. 346, 359–63 (2007).

65. See Johnson & Ricca, *supra* note 30, at 681–83. General counsel can more authoritatively do so if retained by the board of directors, not the CEO. *Id.* at 690. Most general counsel today, however, appear still to report to the CEO, Rostain, *supra* note 31, at 473, though many have a formal connection to the board by virtue of serving as secretary, *id.* at 485–86. Also, Professor Kim urges that counsel for business units report directly to general counsel, not solely to the head of the business unit. Kim, *supra* note 50, at 641–42 & n.265.

66. Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 288 (2004). See also Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 973–74 (2002) (describing how hyper-competition and high-risk strategies among executives result from overconfidence and aggressiveness).

67. See Black, Cheffins & Klausner, *supra* note 36, at 1059.

68. See Johnson, *Business Judgment Rule*, *supra* note 8, at 458–61.

69. See *supra* notes 9–10 and accompanying text. A chief reason for the current financial subprime crisis is that executive compensation schemes created incentives toward engaging in risky organizational behavior. U.S. Secretary of the Treasury Timothy Geithner noted, "Excessive executive compensation

officers to underestimate personal risk exposure and thereby cause them to make faulty personal risk/reward calculations that also affect the company's well-being. That may lead them to engage, in aggregate, in more risky behavior than is desirable for the company. While legal commentary traditionally has emphasized how faulty "upside" compensation schemes create skewed incentives for managers—agents to engage in overly risky conduct,<sup>70</sup> too little emphasis has been given to the way in which better appreciating downside risk may usefully constrain overly risky behavior by officers and thereby also serve to reduce agency costs.<sup>71</sup> In short, if directors *overestimate* liability exposure as an outcome of advice-giving practices, officers may *underestimate* it due to lack of advice, or at least wrongly believe their employment agreements have wholly addressed the issue. The failure on the extrinsic motivator front is not one of law or the liability scheme itself so much as a shortcoming of cultural/institutional practices within corporate law.<sup>72</sup>

The larger failure of the corporate law culture to treat officer fiduciary duties in a meaningful way also appears in the response to the study's question about professional meetings. Only one-third of all respondents recalled attending a meeting in the past five years where officer duties were discussed. Only one-fourth of counsel for public companies recalled attending such a meeting. Likely, few such opportunities even exist, and probably it is for the same reason there is so little corporate law material about officers generally: a continuing and puzzling neglect of the subject in most quarters of the corporate law culture.

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that provides inappropriate incentives . . . has played a role in exacerbating the financial crisis." Stephen Labaton, *Obama Plans Fast Action to Tighten Financial Rules*, N.Y. TIMES, Jan. 25, 2009, at A1. Executives must, in a parallel fashion, know they personally bear downside risk—through possible liability—as well. Without that, the organization bears risk but the individual officers do not. Growing concern about rectifying this asymmetry of risk bearing—in essence, a part of healthy risk management—lies behind widespread outrage over executive bonuses at struggling or failing companies.

70. See Bhagat, Bolton & Romano, *supra* note 24, at 1812–14; see generally LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004).

71. In the delivery of health care services context, it has recently been argued that the utility gained from increased agent care under a tougher liability standard may be offset by a decrease in performance on less observable tasks undertaken by an agent. Martina Samwer, *When Less Liability Leads to More Care: Adverse Effects of Liability Regimes in Multitask Principal Agent Settings*, 4 REV. L. & ECON. 641, 641–42 (2008). Likely, physician conduct is more observable, especially given detailed recordkeeping, than executive conduct. See RAKESH KHURANA, *FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION* 318 (2007). Thus, it is not clear that executives could move from engaging in more observable conduct to engaging in less observable conduct. Moreover, executives, perhaps unlike a physician in charge, are subject to monitoring of their behavior by a superior who could reprimand them for a nonproductive change in conduct or shift responsibility to another person. Finally, the liability standard for officer conduct remains somewhat unclear, see *supra* notes 9–10 and 18 and accompanying text, and this Article is not addressing, as a policy matter, what that standard should be. Rather, whatever is one's normative position on the relative benefits of tighter versus looser liability schemes, officers should, as a positive matter, be clearly advised of their duties so they can discharge their functions on behalf of the company accordingly. For another take on this issue, see Shane A. Johnson, Harley E. Ryan, Jr. & Yisong S. Tian, *Managerial Incentives and Corporate Fraud: The Sources of Incentives Matter*, 13 REV. FIN. 115, 117–18, 142 (2009) (stating that firms with lower likelihood of managerial fraud detection, suggesting lower expected costs of fraud, are more likely to engage in fraud).

72. General counsel elsewhere have strongly urged that responsibility for determining appropriate levels of company risk rests with them. See Rostain, *supra* note 31, at 473. Consequently, advising

#### IV. CONCLUSION

Corporate counsel appear to be the legal actors paying the most attention to corporate officers, to the good of corporate governance and in contrast to other actors in corporate law. To borrow Edward Rock's metaphor of "sermons," in-house counsel seem to be the group most likely to pass along to officers the sermon-like pronouncements about fiduciary duties received from the judiciary,<sup>73</sup> if and when the judiciary issues such "sermons."<sup>74</sup> There are, however, notable areas for improvement. Moreover, reflecting the larger culture of neglect, the advice offered seems, perhaps of necessity, more or less patterned after the advice provided to directors. More sustained attention should be given to the role of officers in corporate governance, generally, and to their fiduciary duties, specifically, by lawyers, scholars, and judges. Without such attention, the sanctioning and regulation of officers may continue to migrate to the federal government—notably, to the SEC—and away from state law. If that happens, no longer can it be said that corporate law is wholly the domain of the states—with a federal presence or threat, to be sure.<sup>75</sup> Rather, we would have—perhaps we already have—an incomplete federalism in corporate law, with directors attended to by state law and officers by federal law. For now, Delaware may "compete" on the officer issue by doing relatively little, preferring to leave sanctioning of executives to the federal government under the auspices of the securities laws. Eventually, however, if pressed more knowledgeable by plaintiffs' lawyers,<sup>76</sup> state law will have to address several open questions about officer fiduciary duties.<sup>77</sup> That, in turn, will more vividly expose Delaware to what Professor Roe has described as the risk of federal intervention.<sup>78</sup>

Certainly one group that should pay close attention to practices in this area are D&O insurers that ultimately foot the bill for officer liability and therefore profess to care deeply about such "deep governance" qualities as company "character" and "culture" in their D&O underwriting practices.<sup>79</sup> One key element of both factors includes whether key officers understand the full reach of their fiduciary

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officers about their duties—given that it may bear on risk/reward calculations and affect corporate welfare—should be widely undertaken by corporate counsel.

73. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 *UCLA L. REV.* 1009 (1997). Such "sermons" (judicial opinions) do little good, of course, if they stop with the lawyers who hear them. Perhaps a better metaphor is that the judiciary is speaking to a convention of religious leaders who then must take the received learning back to their own parishioners (officers) if it is to have any impact. See Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, *MICH. ST. L. REV.* (forthcoming 2009) (describing how lawyers may fail to convey the full moral flavor of judicial "sermons" to their clients).

74. See *supra* notes 7–11 and accompanying text.

75. See Mark J. Roe, *Delaware's Competition*, 117 *HARV. L. REV.* 588, 593 (2003) (arguing that Delaware faces competition on corporate law issues from the federal government); Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 *VAND. L. REV.* 864, 886 (2003) (noting the "dramatic growth in the role of federal law in regulating officers and directors").

76. See *supra* notes 25–29 and accompanying text.

77. See *supra* notes 8–11 and accompanying text.

78. See Roe, *supra* note 75, at 593.

79. Baker & Griffith, *supra* note 22, at 517–25, 539–43.

obligations. Underwriting practices could be modified to require explicit officer acknowledgement of an understanding of the standards for care and loyalty. Currently, moreover, it appears that none of the widely followed corporate governance indices include this element in arriving at overall governance ratings for specific companies, though “director education” and “board skills” are sometimes included.<sup>80</sup>

Indeed, future research in this area should extend our understanding of this important topic by gathering data from all parties to the fiduciary relationship. Although the present study has tapped into the perspective of corporate counsel, and prior research has examined outside counsel, the next step should involve a survey of the recipients of advice—i.e., directors as well as top management—as a means for developing richer data and firmer conclusions on how fiduciary duties actually factor into the work lives of senior corporate officials.

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80. See Bhagat, Bolton & Romano, *supra* note 24, at 1870–76.

APPENDIX A

IN-HOUSE LEGAL COUNSEL QUESTIONNAIRE  
ON GIVING FIDUCIARY DUTY ADVICE

Your identity and responses to this questionnaire will remain confidential. Questionnaire responses from legal counsel will be collected and the aggregate responses will be used in a published research paper, but without identification of the respondents. We estimate that responding to this questionnaire will take no more than 10 minutes.

**I. Background Information**

1. In which city and state do you primarily practice? \_\_\_\_\_  
\_\_\_\_\_
2. Is your organization:  
 Public  
 Private  
 Non-profit  
 Partnership  
 Other (specify) \_\_\_\_\_
3. Under the laws of what state was your organization formed? \_\_\_\_\_  
\_\_\_\_\_
4. What are your organization's annual revenues?  
 Under \$500 million  
 \$500 million to \$2 billion  
 \$2 billion to \$10 billion  
 \$10 billion or more
5. How many in-house attorneys are employed in your organization (in all locations)?  
 One  
 Two-Five  
 Six-Ten  
 Eleven-Thirty  
 More than Thirty
6. What is your position within the organization?  
 Chief Legal Officer/General Counsel  
 Deputy General Counsel  
 Associate General Counsel  
 Assistant General Counsel  
 Division Counsel  
 Other (specify) \_\_\_\_\_



## II. Advising Corporate Officers

NOTE: If your responses require more space than we provided, please use whatever additional paper you need to fully answer the questions and include those pages with this questionnaire.

7. Do you explicitly advise *senior* corporate officers (e.g., Chief Executive Officer, Chief Financial Officer) as to their fiduciary duties,\* *in their capacity as senior corporate officers* (we are not seeking now to know whether you advise such persons in their capacity as directors, only if you do advise them as officers)?

\_\_\_ Yes \_\_\_ No

\*By "fiduciary duties," we simply mean do you in some manner advise officers—in whatever way you phrase or convey the advice—that they have a legal duty to act loyally for the company and a duty to act with reasonable care.

8. If your response to #7 was "Yes," please answer the following questions; if your response was "No," please go to #9 and continue.

- a. Do you advise senior officers as to the fiduciary duty of loyalty?

\_\_\_ Yes \_\_\_ No

- b. Do you advise senior officers as to the duty of care?

\_\_\_ Yes \_\_\_ No

- c. In what settings have you provided fiduciary duty advice to senior officers? (check as many as apply):

\_\_\_ Transactional work

\_\_\_ Executive compensation

\_\_\_ Compliance/Risk management

\_\_\_ Employee relations

\_\_\_ Litigation

\_\_\_ Other (please specify) \_\_\_\_\_

9. Asking you now about advising *directors*, rather than corporate officers, do you now, or have you ever, advised corporate *directors* as to their fiduciary duties?

\_\_\_ Yes \_\_\_ No

10. If your response to #9 was "Yes," is the fiduciary advice you give senior officers the same as or different from the advice you give *directors*?

\_\_\_ The same \_\_\_ Different (please elaborate)

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11. Do you or any other attorneys within your organization provide fiduciary duty advice to officers *other than* senior officers (e.g., to business unit or division managers, or to officers of subsidiaries)?

Yes  No  Don't know

12. Have you, within the past 5 years, attended a conference, seminar, or other professional meeting where the subject of legal counsel specifically advising *officers* (not directors) as to their fiduciary duties was discussed?

Yes  No

### **III. Additional Information**

13. Is there anything else you would like to say in connection with offering fiduciary duty advice to officers?

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