

CORPORATE RESPONSIBILITY

A wider role for in-house lawyers

General counsel are increasingly important in determining their companies' social and environmental policies, says Sarah Murray

As an in-house legal adviser, Roberta Schuhalter Karp used to feel she had to justify her presence at corporate social responsibility meetings to her colleagues. "I would say: 'I'm not wearing my legal hat now - I just have a broader role within the company,'" says the vice-president of corporate affairs and general counsel at Liz Claiborne, the clothing company. "I haven't had to do that for several years."

Ms Karp is not alone in having broadened her role. As corporate liability expands to include issues from breaches of labour practice codes in developing countries to concerns over obesity in the west, senior lawyers are regular participants in meetings to discuss them.

"Companies have their in-house lawyers with them at the table as part of the team," says Phillip Rudolph, partner in the corporate social responsibility practice at Foley Hoag, a Washington DC-based law firm. "Because, depending on the role the lawyer plays and the value they are perceived to add to the management team, they can be strategic thought leaders."

In a recent survey con-



example. In 1998, Mark Kasky, a labour rights activist, sued the sports equipment company under California's unfair competition laws, charging that public statements defending its labour practices constituted false advertising, a position upheld by the California Supreme Court in 2002.

While many feared the case would discourage corporate disclosure, Nike in April confounded those views by releasing a corporate responsibility report that provided not only extensive detail on its supply chain and environmental practices, but also broke new ground in transparency by publishing on its website a complete list of its suppliers.

"There is little doubt that the involvement of lawyers in Nike's programme of disclosure of labour issues in its supply chain has resulted in more insightful analysis and more comprehensive disclosure than the company delivered when it was talking about these issues in the 1990s - which was when it was sued," says Mr Schrage.

Jim Carter, Nike's vice-president and general counsel, believes the key has been communicating in the right way, rather than not communicating at all.

"A natural lawyer's

'We have to understand, anticipate and respond to these emerging social issues before they become legal issues or crises'



In-house lawyers are now having to deal with issues such as breaches of labour practices in developing countries

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ducted by CMS Cameron McKenna, a UK-based law firm, one-third of senior executives said that while the chief executive has overall responsibility for corporate social responsibility, in-house lawyers come second. More than half the respondents said in-house lawyers should take a lead on corporate responsibility.

In some quarters, however, it is the risk-averse approach of legal departments that appears to be hampering corporate efforts to tackle social and environmental impacts. It has been claimed, for example, that legal departments are behind some companies' reluctance to sign up to the UN Global Compact, a voluntary corporate citizenship network.

"There is a sense among American lawyers that aspirational principles create binding legal obligations," says Aron Cramer, who heads Business for Social Responsibility, a US advisory group whose membership includes many multinational companies.

Mr Cramer experienced this reticence while working on human rights issues with one of BSR's member companies. "This company's general counsel office has been quite resistant, and it is the

same principle - that it creates a legal obligation that can lead to substantial liability," he says.

For experts such as Mr Cramer, this position is disappointing. Such a narrow interpretation of liability, they argue, does not take into account broader risks present in a world where legislators, consumers, campaigners and local communities are scrutinising corporate behaviour.

The law alone has an effect. US law schools are starting to teach courses on legal activism as a means to challenge companies on social and environmental behaviour, according to The Changing Landscape of Liability, a recent report from SustainAbility, a long-established business consultancy on corporate responsibility. Even voluntary approaches to CSR can become embedded in law, as company reports on environmental impacts can serve as a basis for compensation claims.

In-house lawyers are also busy drafting company codes of conduct, ensuring compliance with regulations and producing documentation to ensure the standards of third party suppliers meet those of their clients. Mr Rudolph points out that a company such as Disney,

which licenses apparel companies to use characters such as Mickey Mouse on their products, might want to ensure that those companies are not using sweatshops: "If something goes wrong, most people won't know who the apparel companies are - but everyone knows it's Mickey Mouse."

As well as working on compliance and contract diligence, in-house lawyers are also helping companies take a broader approach to man-

aging social and environmental risks.

The problem is that these risks are complex and without easy answers, as the experiences of companies in the apparel industry illustrate. Companies such as Liz Claiborne, Gap and Nike are among those that have been targeted by anti-sweatshop campaigners.

But in an industry that outsources its manufacturing to thousands of suppliers across the world, solutions

are not easy to find. Here, in-house lawyers may need to rely on the advice of others.

"Corporate lawyers may not have all the skill sets required to assess social and environmental issues affecting companies, which is why CSR should be considered by a wider group of personnel," says Bill Carr, partner at CMS Cameron McKenna.

At the same time, lawyers have professional obligations that mean they may have a more objective perspective to ethical issues than others in the management team.

Elliot Schrage, a lawyer and business strategist who was formerly senior vice-president of global affairs at Gap, argues that there is another good reason for getting legal departments involved. "Legal training can force rigorous thinking and analysis that has not historically been the hallmark of corporate responsibility and sustainability initiatives," he says.

Mr Schrage, also a professor at Columbia Business School, believes that what he describes as the "knee jerk protective lawyering" of the 1990s is giving way to more thoughtful involvement by lawyers that is paying dividends.

Nike's approach is a good

instinct is caution, and it's easy to say 'no'," he says. "But for Nike and other companies where communication with the public and consumers is such a big part of the company's business, 'no' isn't always a good answer."

The risk-averse approach means companies may fail to spot problems that lie beyond the immediate remit of legal compliance. What is more, changing values in society increasingly drive the introduction of new rules, such as accounting standards that now require companies covered by the European Emissions Trading Scheme to account for their carbon emissions in trading statements.

"The lines between pure law and the demands of society for change in corporate behaviour are blurring," says Jeffrey Kinder, vice-chairman and general counsel at Pfizer, the pharmaceuticals company. "We have to understand, anticipate and respond to these emerging social issues before they become legal issues or crises."

However, it is at the board level that corporate lawyers can perhaps make the greatest contribution. General counsels who report directly to the board are in a position to bring social and environmental issues to the attention of senior executives.

"The lawyers, particularly the inside general counsel, have a responsibility to bring to the attention of the board and the management all the things they believe create risk factors," says Ira Millstein, senior partner at Weil, Gotshal Manges in New York. "Looking at what might happen and deciding on how to deal with it before it happens - that's just excellent risk management."

AREAS OF ACTIVITY FOR CORPORATE LAWYERS

- **Litigation:** lawsuits based on alleged failures to comply with ethical standards, such as cases brought through the Alien Tort Claims Act in the US.
- **Codes of conduct:** ensuring company compliance with both legal requirements and in-house obligations to behave ethically in all business activities.
- **Contract governance:** incorporation of a company's codes of conduct and ethical practices into contracts with third-party suppliers to ensure they follow the same ethical standards.
- **Corporate governance:** application of regulations such as Basel II, an overhaul of capital adequacy rules for banks, and the US Sarbanes-Oxley reforms of corporate governance that affect any company whose shares trade on US exchanges.
- **Voluntary regulations:** application of external codes of practice to which companies have signed up, such as the Global Reporting Initiative and the UN Global Compact.
- **Risk management:** identification of potential liabilities that might affect a company's reputation, share price and licence to operate, and provision of advice on how to mitigate such risks.
- **Board awareness:** potential for senior corporate lawyers to bring broader issues of sustainability and corporate responsibility to the attention of the chief executive and members of the board.