



A service of NATIONAL RESEARCH Corporation

Volume 11, No. 4, July 2014

## Welcome to The Governance Institute's E-Briefings!

This newsletter is designed to inform you about new research and expert opinions in the area of hospital and health system governance, as well as to update you on services and events at The Governance Institute. Please note that you are receiving this newsletter because you are a Governance Institute member or expressed interest at one of our conferences.

### Terms of Engagement: Board Support of the General Counsel

*This is the third article in a series examining governance tasks that may now require a heightened level of attentiveness.*

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A subtle but critically important task of the hospital and health system board in the current environment is to ensure a suitably prominent role of the general counsel as part of the executive management team. To some, this might appear as an inappropriate interference with the CEO's authority over executive leadership. However, expectations with respect to the (increased) role and responsibilities of the general counsel have dramatically changed over the last 10 years. Indeed, best practices now perceive the general counsel as having greatly expanded duties as both legal counsellor and business advisor. This is especially the case in an industry as complex and evolving as healthcare.

#### The Traditional Role

The traditional role of the general counsel was always fairly clear-cut. She/he serves as a) the legal advisor within the corporation to constituents in an individual professional capacity, b) a corporate officer and member of the executive leadership team, c) manager of the corporation's office of legal affairs, and d) the corporate agent in connection with the organization's dealings and relationships with third parties.<sup>1</sup>

In this role, the general counsel has provided legal advice to corporate officers, board members, and other organizational constituents on such matters as legal and regulatory compliance, internal

investigations, corporate transactions, litigation/dispute resolution, corporate governance, and trends in the law and the potential impact to the organization. The general counsel has always assumed final responsibility for all legal matters that impact the organization.

#### The "New Reality"

Yet much has changed in this regard, and multiple new surveys, studies, and "best practices" reflect the evolution of the general counsel's role from that of a pure legal counsellor to also being a valued business advisor to corporate management and a primary protector of the corporate reputation. The new role projects a broad portfolio, including direct involvement in the corporation's legal matters as well as shared responsibility for its position on ethics, reputation, public policy, communications, and corporate citizenship.<sup>2</sup>

In this new, more prominent role, the general counsel performs a wide variety of functions, including: 1) "creative, affirmative partner" to the management team in support of corporate goals, 2) providing advice from both legal and business perspectives, 3) advising the board on matters of corporate law and governance, 4) playing a leadership role in the development of the organization's ethical standards, 5) adopting and monitoring an effective risk management process, 6) being a key participant in corporate crisis

<sup>1</sup> E. Norman Veasey and Christine T. Di Guglielmo, *Indispensable Counsel: The Chief Legal Officer in the New Reality* (New York: Oxford University Press, 2012), pp. 2-14.

<sup>2</sup> Ben W. Heineman, Jr., "The General Counsel as Lawyer-Statesman," Harvard Law School Program on the Legal Profession, September 5, 2010; see also Veasey and Di Guglielmo, 2012, Preface.

response teams, 7) serving as a “problem solver” on multiple issues (e.g., legal, compliance, ethics, corporate integrity), 8) serving as a mediator of disputes between corporate constituencies, and 9) coordinating corporate communications and government affairs—among many other new roles.<sup>3</sup>

### Where Did This Come From?

What has happened to change things so dramatically? The basic answer should be recognizable to board members—the dramatic increase in the business and legal complexities facing corporations across industry sectors over the past 10–15 years. During this period, government has adopted a markedly more prescriptive approach to regulating corporate affairs than ever before. This has, in turn, required corporations to confront rapidly changing, broad-based new laws and intense regulatory and litigation barriers. The general counsel has evolved to become the keystone of the organizational response, as both a legal and business advisor and guardian of the organization’s reputation.

There are at least five specific elements to this change. First is the way in which the Sarbanes-Oxley Act in 2002 changed the dynamic between government and corporations (and, indirectly, between governance and management). Second is the manner by which the Dodd-Frank Act in 2010 served to increase the level of oversight of corporate governance and operations. Third is the manner in which state and federal regulators have increased their scrutiny on corporate law and governance matters. Fourth is the impact on corporate governance of the proliferation of “best practices” relating to the structure, composition, and role of governance. Fifth is the enactment of federal legislation that has served to fundamentally alter the financial and operational models of particular industries (e.g., healthcare and the Affordable Care Act).

Each one of these elements has proven to have direct application to the non-profit hospital and health system. The collective impact of these elements has resulted in a complete, evolutionary shift in the environment in which the general counsel is expected to function, together with a new “retinue” of interest groups with a significant interest in the role, function, and advice of the general counsel. Indeed, many prominent new corporate surveys have been published in 2014 to date that emphatically emphasize the prominent

<sup>3</sup> Heineman, 2010, pp. 7–11.

new role of the general counsel.<sup>4</sup> These surveys should be required reading for the board.

### What Should the Board Do?

The board should play a key oversight role in ensuring that the general counsel assumes the role and prominence that these new developments and best practices suggest. This is principally because the board has a fundamental duty to ensure the proper role of the general counsel within the context of corporate affairs. This notwithstanding, the CEO has the right to hire, evaluate, determine the compensation of, and perhaps ultimately terminate the general counsel. Best practice requires that these rights be subject to board oversight and ratification.

In this regard, it will be particularly important for the board to recognize the unique tensions that may arise for the general counsel as she/he assumes these multiple new “counsellor/advisor” roles, and be prepared to provide support and guidance.

The multiple functions that the general counsel is now being called upon to perform assign her/him a complex responsibility for which different internal constituents may have varied understandings and expectations. This places the general counsel on what a knowledgeable observer refers to as the “balance beam”—in which she/he must adhere to professional responsibilities within an environment in which different interested parties pull her/him in different directions. A primary source of this tension arises from the expectation that the general counsel will be “independent” (i.e., independent from influences that would jeopardize her/his “ardor for the client,” and independent of client influences so that she/he is able to act in the best interests of the client).<sup>5</sup>

The board should be also attentive to the need for a clear articulation between the roles of the general counsel and the compliance officer. The term “compliance” is increasingly being used in the

<sup>4</sup> *Over the Horizon: How Corporate Counsel Are Crossing Frontiers to Address New Challenges*, KPMG International, 2014 (available at [www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/broadening-role-general-counsel/Documents/general-counsel-survey-report-v3.pdf](http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/broadening-role-general-counsel/Documents/general-counsel-survey-report-v3.pdf)); *GCs in the Boardroom and Beyond: a 2014 Survey*, NYSE Governance Services, Corporate Board Member and BarkerGilmore, 2014; *Skills for the 21<sup>st</sup> Century General Counsel*, Association of Corporate Counsel, December 2013.

<sup>5</sup> Veasey and Di Guglielmo, 2012, Chapter 3; see also Heineman, 2010, pp. 14–15.

media, in governance publications, and other sources to encompass tasks and functions that are properly (or primarily) the responsibility of the general counsel. Board direction can help protect against role confusion that could encroach on the general counsel's rightful responsibilities and otherwise create organizational confusion and risk.

## **Conclusion**

Emerging best practices envision a greatly expanded, more prominent role of the general

counsel. In this expanded role, the general counsel serves not only as a legal counsellor but also as a strategic business advisor, among other roles. The board is generally responsible for the oversight of the corporation's legal function to make sure it is properly structured and staffed. For similar reasons, the board will want to work with the chief executive officer to ensure that the new concept of the lawyer as both counsellor and advisor is properly implemented by the healthcare organization.

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