

What a General Counsel can bring to a company's board

by **Victoria Reese & Lee Hanson**

One of the notable features of the last two proxy seasons is the increasing number of shareholder complaints of misleading or inadequate disclosure materials, with courts often issuing preliminary injunctions enjoining proxy votes. As a February 2013 alert from Day Pitney put it: "At a minimum, management should enter this proxy season with a clear understanding of disclosure obligations and an appreciation of how those obligations are being tested in today's landscape." Given this new climate, we want to explore the role that lawyers, particularly General Counsel, can play on boards.

The increased shareholder activism, which coincides with new government regulations and heightened expectations from company executives and customers, is causing CEOs and directors to consider more carefully the makeup of their boards. As their responsibilities and liabilities have expanded, board members want people at the table who can help them establish "best practices" at every level of the company. They want experts with specialized skills who can identify areas of risk, assess compliance policies, and help accomplish strategic and financial goals. They want professionals who have excellent judgment and top problem-solving skills who have "been there and done that". As a result, the National Association of Corporate Directors (NACD) reports that many companies are moving away from "relationship" boards to "skills and experience" boards.

General Counsels can make a real contribution to the more contemporary, risk-aware board. Many, especially those who have worked for public companies, have helped negotiate mergers and acquisitions, overseen compliance and governance programs, and identified activities that could present a material risk to a company. Due to changing demands and expectations, they have also become more business-savvy. In addition, General Counsels typically have top-notch analytical skills and are trained to examine issues from a number of different perspectives. One of our sources indicated that General Counsels can help protect the company: "General Counsels have to ask smart questions to get to the heart of important matters quickly." They also tend to be good at bringing together opposing viewpoints and building consensus. All of these are important skills to have at the boardroom table.

Resistance is natural

In spite of the value they can bring, there are several reasons that General Counsels aren't more widely-represented on boards. One of the most common is that the CEO and other directors believe the legal perspective is already well-represented by the company's own General Counsel as well as by outside counsel. However, a General Counsel who is also a board member should not be providing official legal advice or performing functions typically taken on by the inside legal department any more than an accountant / board member would assume the tasks of the controller or CFO. The appropriate role of a General Counsel on a board, like any other board member, is to weigh in on strategic and policy issues relevant to the company's business, albeit with perhaps a particular eye to legal issues and concerns.

Another reason for resistance to General Counsels on boards is the notion that lawyers do not have true business experience or the necessary financial savvy. To the latter point, any General Counsel hoping to join a board should be financially literate and well-versed in reading financial statements. It would also help to have successfully led and managed the budget of a legal department and supported an Audit or Compensation Committee. If General Counsels can provide examples of how they have helped a company or department accomplish its goals, it will increase their appeal. As one General Counsel who serves on a sizable public company board told us, "Board members need to see the big picture, to have an 'enterprise-wide' lens."

Going beyond strong legal training

Even though General Counsels as board members do not provide formal legal advice, their training can come in handy when reviewing shareholder communications, whistleblower policies, intellectual property matters, the possibility of criminal behavior, lobbying decisions, certain labor/employment issues, and concerns about D&O and E&O insurance. Many companies these days are also concerned about cybersecurity and patent and trademark issues, which General Counsels are particularly well-equipped to advise on. If the company is contemplating a merger or IPO, a General Counsel with this experience can be extremely helpful to the board. Most General Counsels today are also expected to have a global outlook and insights into entering new markets and dealing with various jurisdictions. They typically understand risk, are good communicators and exhibit executive presence.

In-house lawyers are particularly well-positioned for board appointments given their experiences advising senior management and directors of public companies about internal investigations, regulatory enforcement, securities litigation, executive compensation, CEO succession,

business strategy and operations, and antitrust concerns. They have had to learn how to interact with their own boards effectively. They are called upon to exercise good judgment, have the courage of their convictions and be process-oriented, all things a board member should bring to the table. General Counsels whose positions have expanded to include Human Resources and/or communications are generally more attractive to boards. Those who have been promoted from a strictly legal role to a broader business role are often the ideal profile.

Special skills are sought

General Counsels who have worked in government or a regulated industry – e.g. financial services, pharmaceuticals or utilities – can bring additional value to the boardroom, particularly if they have worked for a public company and are intimately familiar with the wide range of corporate regulations now facing companies – Sarbanes-Oxley, Dodd-Frank, the Foreign Corrupt Practices Act, and the UK Bribery Act. As one interviewee told us about his board's concerns, "Good corporate governance is as important as a clean balance sheet."

In fact, in the 2012 *Board of Directors Survey* by Heidrick & Struggles and WomenCorporateDirectors¹, directors ranked "the regulatory environment" and "risk management" among the top ten challenges facing corporations today. They also identified both of these areas, along with M&A experience, as "missing skill sets" among today's board members.

Dodd-Frank introduced 400 new regulations for corporations (including a new "Standard of Corporate Governance"), but as of May 2013, fewer than 39% had been implemented. As more of the regulations are finalized by federal agencies, the knowledge required of board members will increase and evolve. So, too, should the types of professionals being considered for board appointments.

¹ The 3rd annual, 2012 *Board of Directors Survey* by Heidrick & Struggles, WomenCorporateDirectors, Professor Boris Groysberg of the Harvard Business School, and researcher Deborah Bell
www.womencorporatedirectors.com/associations/9942/files/2012_BOD_Survey_Report_FINAL.pdf

Share the risk

General Counsels who serve on boards can help their fellow board members focus on achieving the business' objectives, while keeping an eye out for and minimizing potential legal risks. They can also help the board balance those risks against potential gains. And since directors bear increasing liability for their decisions, it can be reassuring for other board members to look across the table and see that a lawyer has carefully analyzed and yet is still comfortable taking those risks.

Expand the slate

Long gone are the days when only sitting or retired CEOs were viewed as attractive board candidates. Given the pressures on CEOs these days, combined with the more expansive view that Nominating and Governance Committees are applying to director selection, a much wider range of candidates is considered suitable for board service. Putting forward General Counsels as possible candidates can make particular sense when the company is facing unusual legal or regulatory challenges. Moreover, a board that is seeking to diversify its makeup by adding women and / or people of color would be well-served by considering General Counsels, given the deeper pool of diverse talent in the position.

Not every General Counsel, of course, is well-suited to be a board member of a public company. Nor is every board well-served by adding a General Counsel to its roster. This determination can only be made on a case-by-case basis, balancing the makeup and skills of the existing board with the perceived needs based on the company's obligations, regulations and future strategic direction. Still, we believe that General Counsels are too often overlooked as board candidates based on an outdated perception of the role, the skills that are required and the tasks they tend to perform as well as an underestimation of the value they could likely contribute to a board.

About the authors

Victoria Reese

Victoria Reese is the global head of Heidrick & Struggles' Legal, Risk, Compliance & Government Affairs Practice

vreese@heidrick.com

Lee Hanson

Lee Hanson is a vice chairman of the firm and a senior member of the Global, Legal, Risk, Compliance & Government Affairs Practice and the CEO & Board Practice

lhanson@heidrick.com

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