O V E R S I G H T

Having the General Counsel’s Back

By Michael W. Peregrine, McDermott Will & Emery LLP

A n increasingly important oversight role of the board is to ensure the proper organizational profile and influence level of the inside general counsel. In today’s highly regulated nonprofit environment, the general counsel plays a crucial role in corporate affairs and governance. Most observers perceive the general counsel as the guardian of the corporation’s integrity and reputation. This means, of course, that the general counsel is sometimes at the center of executive or organizational conflict and challenge—it goes with the territory. Emerging governance best practices task the board with the specific obligation to support the role of the general counsel: to have the general counsel’s back.

The root of this best practice lies in recognition that the general counsel represents the nonprofit corporation as a whole; he is the corporation’s lawyer and not the CEO’s lawyer. Much of the controversy related to the role of the general counsel has arisen from a reluctance of some to recognize the dual reporting relationship of the general counsel—to the CEO and the executive leadership team on operational matters, and to the board on fiduciary matters related to the legal profile of the organization. Satisfying these two constituencies can place the general counsel in awkward and uncomfortable situations. Sometimes, these can be career threatening in nature. The following discussion is intended to offer suggestions on how the board can satisfy its obligation to support the proper role of the general counsel and, in so doing, serve the best interests of the organization.

First, a Little Perspective

Before the board can take action with respect to the role of the general counsel, it is helpful to understand his perspective when providing advice:

It Goes With the License: The board should recognize that the general counsel is bound by professional responsibility to represent the corporation. There is no wiggle room here: the general counsel is obligated to view the corporation as the client and not individual representatives or agents of the organization. His advice, whether positive or negative, proactive or reactive, must be considered in that context.

Common Ground: The board should also know that, as recent law provides, corporate officers like the general counsel are considered to owe the corporation the same types of fiduciary duties as do members of the governing board. So there is a commonality of interest involved here.

You Need Them: The board is expected to turn to the general counsel for advice in connection to the legal risk profile of the organization and the effectiveness of the corporate compliance plan. This is especially the case in the current era of corporate accountability. Recent developments in the nonprofit world have harshly treated boards that failed to seek the general counsel’s advice, as well as executives who sought to marginalize the role of the general counsel.

Key Example

Much of the focus on this issue comes from the well-publicized action of the board of the famous Smithsonian Institute when it addressed a governance crisis in 2007. The Smithsonian’s governance problems revolved around ineffective board oversight of executive management and corporate affairs and a “secretive, insular and imperialistic” executive management culture. A particular manifestation of this culture was the marginalization of the office of general counsel. The Smithsonian CEO prohibited the general counsel from having any direct access to the governing board, denied the general counsel any meaningful role in the oversight of executive functions, and had general counsel staff reduced at a time when the complexity of its workload was

WARNING SIGNS THAT THE GENERAL COUNSEL’S ROLE IS BEING INAPPROPRIATELY LIMITED

• Lack of board access to the general counsel
• Legal reports to the board provided by the CEO and not the general counsel
• Material reductions in the budget and staffing in the office of the general counsel
• Executive criticism of the general counsel as too negative, not a dealmaker, an obstructionist, or similar descriptions
• Precipitous termination of the general counsel
• Nonparticipation in material corporate transactions
• A general lack of an organizational profile for the general counsel
increasing. The board perceived these actions as inconsistent with corporate compliance and as limiting the board’s ability to render informed decisions.

The Smithsonian board responded to these problems in a farsighted manner. It adopted policies designed to increase the general counsel’s access to the board, to bring forward matters deserving board attention, and to serve as a resource for informed board deliberations.

These and many other governance changes enacted by the Smithsonian board have been hailed as the byproduct of a process that applied to best practices in 21st century nonprofit governance. As such, they serve as a model for governance initiatives—including those with respect to the office of general counsel—for other nonprofit, tax-exempt organizations. (To read the report and other stories, Google “Smithsonian report on governance.”)

**So What’s a Board to Do?**

The highly regulated environment in which nonprofits operate requires that the board take a leadership role in confirming that the general counsel is part of the oversight and decision-making process—notwithstanding the potential for conflict that can arise from a dual reporting relationship. Accordingly, the board must act in this regard in a precise and controlled manner. Fortunately, there are a series of increasingly well-established steps that the board can take to ensure the proper organizational position of the general counsel:

**Ensure Access:** The general counsel’s access to the board should be inviolate. He should be invited to attend all meetings of the board and all key committees. He should also have access to the board chair whenever necessary; it is a dual reporting relationship.

**Get Involved:** The board should have information or (better) ratification rights with respect to the hiring, compensation and termination of the general counsel. The hiring issue is important because it helps assure the board that qualified counsel is being engaged. The compensation issue goes to the importance that the organization attributes to the position. The termination issue allows the board to understand the circumstances of separation, particularly if organizational compliance “red flags” come up.

**Tone at the Top:** The board can evidence its support for a strong general counsel role by both “talking the talk” (board communications that demonstrate the general counsel plays an important role in governance and legal compliance) and by “walking the walk” (practicing what it preaches about the role of the general counsel).

**Budget Oversight:** In order to protect against marginalization of the general counsel, the board should exercise careful oversight of the budget for the office. Nothing speaks more to the board’s commitment to legal compliance than providing budget and staffing necessary to do the job. This is particularly the case where regulators are warning of the dangers posed by reducing the size and budget of the office to save costs.

**No Siloing:** There are few issues facing a regulated nonprofit corporation that don’t impact the responsibilities of the general counsel. The board should work hard to prevent organizational siloing, where the general counsel is cut out (for turf reasons or otherwise) from operational decisions with clear legal implications, such as human resources issues and executive compensation.

**Outside Counsel:** While it’s fine for other executives to hire outside counsel, the board should establish specific guidelines for those outside counsel to keep the general counsel informed. That’s the only way the general counsel will have the “full picture” when advising the board on the organization’s legal profile.

**Let’s Not Forget the CEO!**

In taking these steps, the board must respect the natural expectations of the CEO with respect to his obligation for day-to-day operations. In ensuring a proper profile for the general counsel, the board should not go overboard and interfere with the CEO’s need to exercise appropriate organizational leadership and to set reasonable performance expectations for the CEO’s leadership team. The only legitimate exception would be where the CEO or other senior leaders are frustrating the ability of the general counsel to perform his duties to the detriment of the board’s decision-making rights and/or to corporate compliance. Those situations are rare indeed, but they have been known to occur. In that case, the board serves its core oversight role by vigorously asking questions when warning signs start rising. (See sidebar.)

It is a function of the current corporate accountability environment, as well as a lasting legacy of Sarbanes Oxley, that the general counsel assumes a role (properly) as the guardian of the corporate conscience. This is especially the case with highly regulated nonprofit organizations whose assets are dedicated for charitable use. Given such circumstances, the nonprofit board has an affirmative obligation to ensure a proper organizational profile for the chief legal officer and to have the general counsel’s back.

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