

# VIII. The GC and the board

*I have a special practice. I handle one client. Now you have my number, I'll await your call.<sup>20</sup>*

## **1. Background to your board relationship**

If, as the GC, you have interaction with the board, then like Tom Hagan in *The Godfather*, you will need to await their call and be ready to respond when you receive it. Quickly! One of us in his GC role spent about half his time working with the board on board-related matters, and the role tends to take precedence over everything else. You will need to prioritise the board over anything else you do, and that can cause frustrations with other people in the business.

Don't naturally assume, however, that you will always be at board meetings – unless you wear the company secretary hat, in which case you will be there to act in that capacity (more about this later on). But it is very rare indeed for the GC to sit on the board as a full member – only a tiny proportion of GCs ever do this. In part, that is because the role is seen by many boards as an advisory function; but there is also an independence issue: can you really act as an independent, objective adviser if you are also a member of the body you are advising? So if, as the GC, you are ever asked to sit on the board, that is something to think carefully about before agreeing. In our view, you are better placed in the role of independent adviser than full board member.

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Another reason why you may not attend board meetings is simply due to a limit on the number of attendees. A common complaint of boards – especially from NEDs – is that the more people who attend, the more this tends to curtail the room for debate and discussion, and extend the meeting. Accordingly, the chair may only want key decision makers and advisers present. You may regard yourself as fitting into this category – and in many ways, you do – but the board can always communicate their needs to you or ask you to attend when they believe your advice or counsel is required. While this is not ideal – there may be occasions when the board are unaware that legal advice is necessary or that a legal issue has arisen – boards (like everything else) are not perfect. One way to ensure that you have a good feel for what is going on is to foster your relationship with the CEO or the company secretary, who may have a reporting line to you in any event. And you can always ask to see the minutes and pick up any issues from there.

In addition, while attending the board meetings may seem important and interesting – after all, it allows you to find out what is going on at the top of the company – you may need to assess how much of a priority this really is. If you are heading a sizeable legal team, you will have the flexibility to spend time at board and board committee meetings (which may take a fair chunk of time); but if you are a sole

GC in the business, you may need to assess what is most important to ensure that the company is fully and effectively serviced from a legal standpoint. That said, in heavily regulated sectors, it is likely that the GC will attend board meetings whether or not they have the time!

Whatever your time with and exposure to the board, this is a very important part of your role; so how do you make the relationship a successful one?

## 2. Build your relationship with the board with care

In its seminal report, *Do You Have the Right C-Suite?*,<sup>21</sup> Heidrick & Struggles states that: “For the General Counsel, who must have a strong working relationship with the CEO but whose client is ultimately the company... expectations require a delicate balancing act as well as a wide range of leadership abilities.”

**Tip: Understand how boards work and build your relationship with your board with care. Humility and being on top of your brief are key.**

There is no doubt that this is a role that requires both diplomacy and independence. Building an effective relationship takes time and careful nurturing; destroying it is quicker and easier. So, how best to build it?

- Stay on top of your brief – always! In your interactions with the board, they will require your counsel and guidance; but for them to put their trust in you, they will also require confidence in your abilities and effectiveness. One of us earlier in his career recalls the chair turning around and saying, “I look to you as general counsel to keep me and the other members of the board out of prison.” He was only half joking and in any event this was an area where we outperformed! But seriously, when a member of the board turns to you, you must be able to provide an answer – or at least give an initial view and know where to get a firm response and by when.
- Boards don’t generally like lawyers and they like the law even less! While this may seem an exaggeration – in respect of lawyers at least – it is often not far from the truth. Lawyers are frequently seen as problem causers and expensive. If you are asked to advise on a matter, do just that, but don’t bore the board with the law – they are simply not interested. They want a solution to their issue – either from you or outsourced.
- But they do want an answer. In this respect, you must treat the board like anyone else you advise. The law is complex and full of shades of grey – directors appreciate that. But they need an answer, and one of the great benefits you have over external lawyers is having a better idea of the context – for example, the

company you work for and the board members – as well as not having to cover your back with caveats. One of us advises boards frequently and a common feature he has noticed is that the two principal skills that directors need are courage and integrity. Most have the latter; many fewer have the former. The same is true for lawyers: you must give a view. One of the directors we spoke to said he found that the best GCs working at board level were those who outlined a straightforward answer to a particular risk and assessed on a percentage basis the chances of it occurring, as well as the best practical ways to deal with all of its aspects.

- If you do make a mistake, own up. We all make mistakes and everyone will respect you the more for it. One of us once forgot to do something for a board meeting and had the dilemma of hoping that the matter would go away or brushing over it. He chose the latter; two of the directors rolled their eyes and he felt foolish. But at least he had been open. Years later, one of the eye-rolling directors told him how much he had admired this honesty, and that when the director himself had been less transparent with another board he was on, it had ended in disaster. Remember: once the board no longer trusts you, you have no place as their adviser.

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- Wear your intellect lightly, but your gravitas highly. You need to look and act the part at all times. Again, it is all about instilling confidence. One GC we know – a very bright individual – has a habit of cracking jokes to the board, as well as other people he advises. Believe us, if the board want some light relief, there are other means available. While the board don't want a po-faced GC, they wouldn't dream of taking legal advice from a regular performer at the Comedy Store, so you shouldn't act in that way either. Be serious but approachable in your dealings with the board, even if they scare the hell out of you (they shouldn't).
- You should be the board's 'extra conscience'. As Patrick Dunne writes about the GC (and company secretary) in his book *Boards: A Practical Perspective*:<sup>22</sup> "The best act as the board's extra conscience and confidant to every member. They will also play a central role in ensuring that relations between the board and the executive are effective."
- It is important to be able to fulfil these roles, as well as acting as an independent and objective adviser to the board. However, this can be a challenge to balance in practice. Your role, as GC at least, will report to the CEO or maybe the CFO. While you need to have a relationship with the board, you need to manage your relationship with the CEO first and foremost, unless very exceptional circumstances arise. However good and close your relationship is with the board, you will never be the principal (executive) player – that position very much rests with the CEO. So ensuring that the CEO is not taken unduly by surprise by what you are talking about at board meetings will strengthen your relationship with them (they are, after all, a very important component of the board), make you more effective and, of course, ensure your longevity. You should let the CEO run the main relationship with the board and be the major player – so big news should come from them. CEOs are often people with large egos, to whom humility is an alien concept; so even if the CEO ventures into your area of responsibility and speaks on your behalf (a common occurrence), it is probably best to let this go – you can always add your own contribution to what they have said. All of this doesn't mean, of course, that you should be afraid to speak up when necessary; and in extreme cases, you may have to talk to the chair or other board members about and without the CEO if there is any hint of unethical behaviour. Hopefully, however, this will be the exception rather than the rule.
- Don't be afraid to speak up, but be clear on the mandate. As we have outlined above, you should be able to add your contribution. But just as the CEO may hog the conversation and cover all the areas of their direct reports, this is something you should never do. As one GC we spoke to advised, it is fine to talk

outside your area (to an extent) at exco level; but at the board, stick to your brief – literally. That is what you are there for and what the board wants you to opine on – as we have written elsewhere, as much as you might want to give a view on corporate strategy, it's best to leave that to the experts. At least one of the GCs we spoke to generally left it to the chair and CEO to bring him in when they felt this was necessary – he had built up a sufficiently good relationship with them that he knew they would call him in when needed. That said, you should be well known to the board and be prepared to speak up when required. Having evaluated boards, we have seen instances where the GC simply sits throughout the whole meeting and says little or nothing; you do need to contribute, at the very least when asked.

- Get to know how boards work. We will examine this more fully in the next chapter, but suffice to say here that if you have not worked with boards before, seek to understand how they function from an overall governance, structural and dynamics view. A listed public limited company (PLC) board with both executives and non-executives will be very different from the board of a private company, a charity or a non-governmental organisation. You need to understand the dynamics.
- And the politics! All boards have political undercurrents – some members who get on well, others less so. You could be unlucky and join a board where the two most important members – the chair and CEO – do not get on and there is a good deal of conflict and tension. If this is the case, your powers of discretion and diplomacy may come to the fore; but being the GC to a dysfunctional board can be very lonely and frustrating. This may be where having a mentor or coach becomes important.
- While the board is at the apex of any business, remember that it is also a team, and in this respect it shares many of the features of other teams within the business. Therefore, treat it in this way too. Show the value that you can add – not least in reducing costs and being able to provide immediate and contextual legal advice in a way that an external lawyer may be unable to. Equally, don't be offended if the board wants a second opinion from an external source on a material matter. You cannot be an expert in everything and, in any event, you are likely to be the person deciphering the advice to make it more manageable for the board. As you will know as an experienced GC, the ability to determine when to do something yourself and when to outsource is critical to your effectiveness and the success of the organisation.
- Recognise the conflicts. Boards are full of conflicts. Many are legal and corporate conflicts, but there are others too. However, one conflict you must remember is your own. In essence, your

client is the company. The interests of the company and the directors will normally coincide; but on rare occasions, they may not. This is when you need to remember that you are an adviser to the company first and foremost. There will be situations where the directors need advice, but you cannot advise them, as that would conflict with your duty to the company. A company going into a type of insolvency may be an example. Recognise this and, more importantly, have a recommended panel of external legal advisers for the board (different from your company panel, of course), to whom the directors can turn. You need this to hand because when this type of situation arises, external legal advice may be needed very quickly indeed.

- Finally, when you work with boards as the GC, remember that although this can be both stressful and frustrating, it is also an immense privilege. You will be working with the people who determine where the company is going (or not going!), and witness their hopes, fears, objectives and foibles. However, with privilege comes responsibility. Much of what goes on at the board will be confidential and needs to remain so. This is even more the case with listed companies. It goes without saying that the board will expect you to respect the confidential nature of what they do.

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*This chapter 'The GC and the board' by Ian White and Simon McCall is from the Special Report 'Your Role as General Counsel: How to Survive and Thrive in Your Role as GC', published by Globe Law and Business.*