



Counsel's Role in Facilitating Good Corporate Governance

Who's Really in Charge Here?

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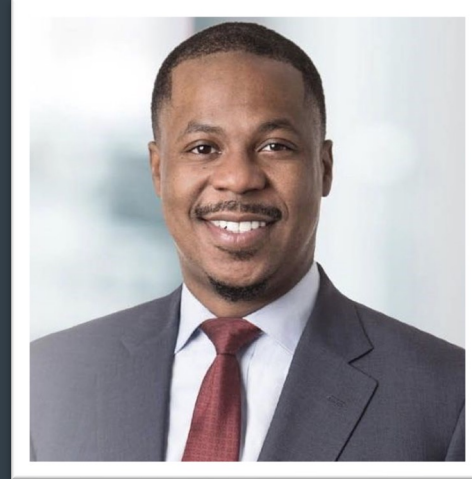
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Agenda

- Duties of Board of Directors
- Role of Counsel
- Legal Considerations
- Best Practices



Duties of Board of Directors

Four Core Fiduciary Duties

- Care
- Loyalty
- Good faith
- Disclosure



Sources of Governance

- Articles of Incorporation
 - Stockholder Approval to Amend
- Bylaws
 - Board Approval to Amend
- State Law
 - Can be used if the Articles and the Bylaws are silent

Duty of Care

- Process driven standard - ultimate goal to make an informed and deliberate decision
 - Remain informed and offer input throughout the process
 - Sufficient time allotted for careful and considered decisions
 - Participate in discussions, review and understand materials and key transaction terms
 - Access to and receipt of advice from advisors

Duty of Loyalty

- The “duty of loyalty” requires that decisions be made in the best interests of the company and its stockholders, not on the basis of personal interests.
- Important to identify potential conflicts of interest and implement procedures to address them in every deal.
- Failure to adhere to the duty of loyalty could result in enhanced scrutiny over the fairness of a transaction.

Duty of Good Faith

- The “duty of good faith” prohibits directors from:
 - Consciously disregarding their duties
 - Intentionally violating the law
 - Acting with a purpose *other than* in the best interests of the corporation and its stockholders

Duty of Disclosure

- The “duty of disclosure” arises when the board asks stockholders to approve a proposal.
- Board must provide stockholders “full and fair disclosure of all material facts” necessary to vote on the proposal.
- Disclosure will include a summary of materials considered by the Board and a detailed outline of all steps taken by the Board.
- *Practical Tip: Assume all information considered by the Board and each step of the process will be made public and subject to outside scrutiny.*

Standards of Review

- Business Judgment Rule

- Presumption that in making a business decision the directors acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company; no hindsight risk
- The process the Board follows to satisfy its duties is critical to whether directors receive the benefit of the business judgment rule
- Presumptions shifts in cases of the sale of the company or conflicts

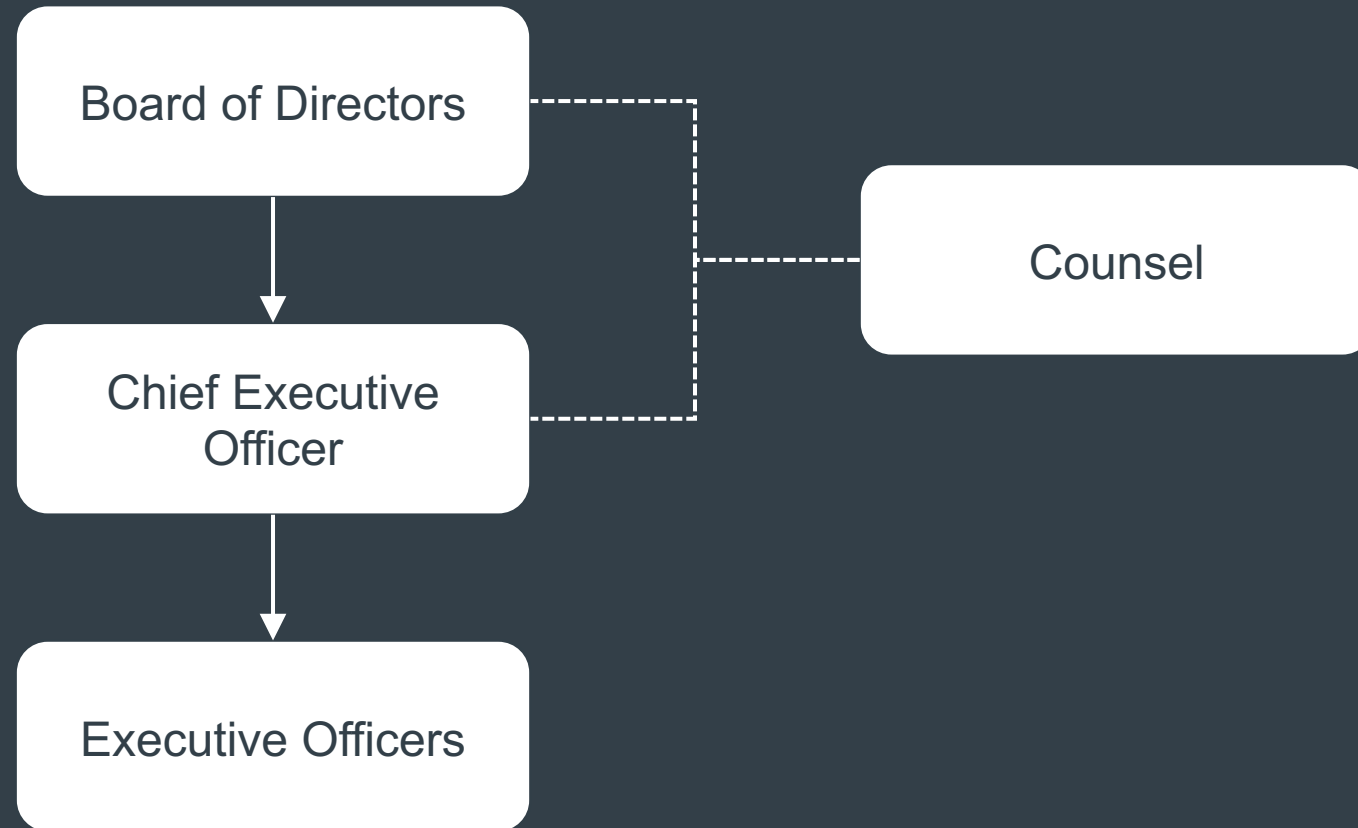
Role of Inside Counsel

Counsel's Multifaceted Role

Counsel is expected to be both effective legal counsel and trusted business advisors:

- Independent duties to both:
 - Board of Directors and
 - Executive Officers
- Counsel still has professional ethical obligations

Model Organization Chart



Who Is the Client? ABA Rule 1.13

Client-Lawyer Relationship

- Internal counsel represents organization
- Duty to report if someone in the organization is taking action to harm organization
- Refer to higher authority if “reasonably necessary” to protect the best interest of the organization

Who Is the Client? ABA Rule 1.13 (cont.)

Client-Lawyer Relationship

- Noisy withdrawal, if necessary
- When dealing with a corporate constituents, must disclose who you represent
- In certain situations, you may be able to simultaneously represent officers, directors, and/or employees

Counsel's Responsibilities to the Board v. Counsel's Responsibilities to Management

What happens when counsel's responsibilities to the board and counsel's responsibilities to management collide with one another?

Hypothetical #1

- CFO walks into your office and says there was a problem with last quarter's financial reports. A Board Member just told you last night that the audit committee just approved the reports.
 - What do you do?

Hypothetical #1 Follow Up

- Follow-up: The Board Member, upon learning about the potential issue believes, based on the Board Member's years of experience, that the errors are immaterial and does not want to reconvene the audit committee and spend even more money on preparing the reports. The CFO thinks the mistakes are material.
 - Now what do you do?

Hypothetical #2

- CEO walks into your office and says that there forthcoming allegations of the CEO's workplace misconduct that are categorically untrue. The CEO says that as company counsel, you need to put an end to this and defend both the CEO (as the leader of the Company) and the Company's reputation.
- Who is your client?
 - What is your duty to the CEO? What is your duty to the board?

Hypothetical #3

- The majority investor of the company walks into your office and says that the CEO and two Board Members are collectively putting together an offer to sell the company.
 - Who is your client?
 - What is the role of the Board?
 - What action, if any, can be taken against the CEO or the Board Members?
 - What is the Board's duty to minority investors?

Hypothetical #4

- An employee in the sales department has reason to believe that an unfortunate pattern of discrimination within the organization explains why the employee was not selected for a promotion. The employee looks to get advice from the company's counsel.
 - Who is your client?
 - What do you do?
 - Is there a way to resolve the issue without going to the Board?

Hypothetical #5

- Counsel at a liquor company knows that an executive intends to launch a product sampling and social media campaign. The executive is not concerned about market appearance (or even the reality) that some of these advertisements may reach underage individuals.
 - Do you have a duty to bring this to the Board's attention?
 - How do you safeguard confidential business information...?

Privileged Communication

- The attorney-client privilege.
- The work product doctrine.

Attorney-Client Privilege

The attorney-client privilege protects confidential communications:

- Between counsel and company personnel.
- Made for the purpose of obtaining or providing legal advice for the company.
 - There is a nuance to joining business and legal advice together.
 - There is an art to taking Board minutes.

The Work Product Doctrine

- The work product doctrine's protection extends to documents and tangible things prepared in anticipation of litigation by:
 - In-house counsel
 - Retained agents and experts, at the direction of counsel
 - Other company personnel, at the direction of counsel

Legal Considerations

Mergers and Acquisitions

- Enhanced M&A Scrutiny Review (*Revlon*)
 - Sale of Company for cash warrants a higher level of examination.
 - Directors must show that they acted reasonably to obtain the best value available for stockholders under the circumstances.
 - Maximizing the price per share is primary goal, but exceptions can be made.
 - Permitted to consider other factors such as barriers and risks to achieve closing, and other contingencies such as regulatory and financing risks, synergies with potential buyer, etc.
 - Directors should consider “Why now?” and the implications of remaining a standalone company or a partial sale of the company’s assets.
 - Who knows what and when? When should the board bring counsel “over the wall”?

Employment Law

- Hiring Practices
- Separation Packages
- Compensation
- Review of Executive Performance
- Misconduct and Investigations

Outside General Counsel

- Is company counsel and outside counsel always aligned?
- When should the Board obtain its own counsel?

Best Practices

Training

- Diversity, Equity, and Inclusion
- Workplace Misconduct

Consistent Decision-Making Processes

- Acknowledgement of the Rules
- Same Decision Makings
- Same Application of Policies

Disclosure Will May Set You Free

- Director and Officer Questionnaires
 - Indemnification Obligations
- Notify All Stakeholders
 - Directors, CEO, Insurance Carriers, and Outside Counsel
- Turning a Blind Eye Can Lead to Willful Negligence